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Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-92

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(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Jt.App. 46-59), together with the dissenting opinion of Circuit Judge Hamlin (Jt.App. 60, 61), is reported at 432 F.2d 755 (1970).[1]

[1]The appendix agreed to by petitioners and respondents and printed in a separate pamphlet is referred to herein as "Jt.App." The appendix at the end of this brief is referred to as "Attached Appendix."

The opinion of the District Court (Jt.App. 22-43) is reported at 1967 Trade Cas. ¶72,298 (N.D.Cal. 1967).

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1970 (Jt.App. 62). On December 22, 1970, by order of Mr. Justice Blackmun, the time within which to file a petition for a writ of certiorari was extended to February 18, 1971 (Jt.App. 63). On February 9, 1971, by order of Mr. Justice Douglas, the time within which to file a petition for a writ of certiorari was further extended to March 4, 1971 (Jt.App. 64). The petition was filed March 4, 1971, and was granted June 1, 1971. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The case arises on a motion, pursuant to Rule 12(b)(6) Fed.R.Civ.P., to dismiss the First Amended Complaint of Trucking Unlimited, et al., on the ground that such complaint fails to state a claim upon which relief can be granted. The following questions are presented:

1. Does an alleged agreement with anticompetitive motive by a group of certificated motor carriers, followed by the implementing and publicizing thereof, to carry out a jointly financed program of opposing, before the California Public Utilities Commission, the Interstate Commerce Commission,

and the appropriate federal or state courts, all applications, irrespective of their merits, for certificates of public convenience and necessity, or for the transfer or registration of certificates, constitute a violation of the antitrust laws where there is no allegation that defendants' efforts to influence the administrative bodies and courts were other than genuine, and no allegation that false or irrelevant evidence was ever presented, and no allegation that the administrative agencies and courts were ever lacking in, or prevented from exercising, full control over the extent to which they would allow protests and participation, and no allegation that the administrative agencies and courts were ever prevented from exercising full control over their determinations on the merits?.

2. Does not the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965)), holding that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, clearly extend to the alleged activities enumerated above?

3. Does not the *Noerr-Pennington* doctrine extend to such alleged activities even if the complaint be construed to allege that a primary purpose of defendants was to discourage and deter plaintiffs and others in like position from initiating or pursuing applications for certificates, or the transfer or registration thereof?

4. Would not a construction of the Sherman Antitrust Act to make unlawful the activities alleged in the First Amended Complaint infringe upon the constitutional right to petition provided for in the First Amendment?

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The appendix attached at the end of this brief sets forth the relevant provisions of (1) the United States Constitution, (2) the Sherman and Clayton Antitrust Acts, (3) the Interstate Commerce Act, (4) the Administrative Procedure Act, (5) the General Rules of Practice of the Interstate Commerce Commission, (6) the California Public Utilities Code, and (7) the Rules of Practice and Procedure of the California Public Utilities Commission.

STATEMENT

1. History of Action Below

A civil antitrust action was filed, pursuant to 15 U.S.C. §§15 and 26, on May 6, 1966 in the federal District Court for the Northern District of California, by 14 of the 15 trucking plaintiffs against the 19 trucking defendants, seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§1-27.[2] The pertinent sections of those acts are set forth in the attached appendix of this brief, pp. i and ii.

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[2]The fifteenth plaintiff joined later.

All of the 15 plaintiffs allege in their complaint that they are highway carriers of property within California, operating under certificates or permits issued by the California Public Utilities Commission (PUC) for intrastate traffic, and under authorizations of the Interstate Commerce Commission (ICC) for interstate traffic. Similarly all of the 19 defendants are highway carriers operating in California under similar authority and jurisdiction of the California PUC and the ICC.

The complaint as originally filed on May 6, 1966 was the subject of several motions, including a motion to dismiss. Before a ruling thereon plaintiffs filed their First Amended Complaint (Jt.App. 1-18) on February 20, 1967. Defendants then filed a pleading consisting of (1) a motion to dismiss the First Amended Complaint on the ground that under the *Noerr-Pennington* doctrine plaintiffs had failed to state a claim upon which relief could be granted, and (2) a motion to dismiss or stay on the ground that the doctrine of primary jurisdiction required such dismissal or stay. (Jt.App. 19-21.)

Oral argument before Federal District Judge Swigert was confined to the first of these motions. He granted such motion by Memorandum of Decision dated October 5, 1967, (Jt.App. 22-43). In a letter to plaintiffs' counsel dated October 25, 1967 (Jt.App. 44, 45) the Judge made clear that his decision was limited to such first motion.

Judge Sweigert opined that since the pleading had already been amended once, plaintiffs had gone as far as they could "truthfully go toward alleging an antitrust violation", but he allowed them 15 days to file leave to

amend (Jt.App. 43). They declined, and instead appealed his ruling.

Oral argument in the Court of Appeals for the Ninth Circuit took place on October 13, 1969. One year later, on October 5, 1970 that Court issued its decision overruling Judge Sweigert by a 2 to 1 vote (Jt.App. 46-59). Senior Circuit Judge Hamlin agreed with Judge Sweigert and wrote a dissenting opinion in which he added a number of comments in support of the District Court's views (Jt.App. 60, 61).

2. Contents of First Amended Complaint

The First Amended Complaint (Jt.App. 1-18) mingles alleged facts with various condemning characterizations or conclusions. The alleged facts are as follows, with the characterizations and conclusions set forth in the footnote following:

> FACTS ALLEGED: Defendants since 1961 have conspired to weaken or put plaintiffs and others in like position out of business. To this end they have:
>
> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing "with or without probable cause and regardless of the merits" every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting

complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program.

3. *Achieved* their agreed upon aims as follows: (a) depleted the resources of plaintiffs and others in like position; (b) delayed the ultimate granting of rights, transfers or authorizations; (c) caused the denial or restriction of rights since the application for such rights would otherwise have been granted "because no opposition would otherwise have been commenced"; (d) discouraged and deterred plaintiffs and others in like position from initiating or pursuing requests, applications or actions for rights, transfers, or registrations.[3]

---

[3]CHARACTERIZATIONS OF FACTS ALLEGED OR CONCLUSIONS: Plaintiffs declare in their First Amended Complaint that by means of the facts alleged defendants have practically and actually made unavailable, and have effectively closed to plaintiffs and others in like position, free and unlimited access to the machinery of the California PUC, the ICC, and the courts and have been able by their joint financing to make opposition which would not have been made but for such joint financing; have clogged and impeded such machinery; have abused such machinery; have denied to the California PUC, the ICC, and the courts the benefit of facts which plaintiffs might have presented had they not been discouraged or deterred; have harassed and obstructed plaintiffs and others in like position; have defeated, delayed, or restricted rights, transfers and registrations; have thwarted the policy of the PUC in liberally granting operative rights; have become the regulators of the rights, transfers and registrations in place of the PUC, the ICC, and the courts; have acquired and aggrandized their economic power and their monopoly power.

3. Reasoning of Federal District Court, per Judge Sweigert, In Granting Motion to Dismiss

In granting defendants' motion to dismiss, Judge Sweigert of the Federal District Court observed (Jt.App. 25) that the scope of the First Amended Complaint is expressly limited by its own language reading as follows (Jt.App. 4):

> "Plaintiffs, and other competitors of defendants who are joined herein or who are members of the designated class do not complain of any activities of defendants or their co-conspirators toward or in reference to any function of the ICC or PUC except as such activities pertain to the precise proceedings before those bodies."

He noted further that plaintiffs had stated in their brief before the federal District Court that "The misuse of judicial process constitutes plaintiffs' entire factual and legal case . . ." (Jt.App. 25).

Relying upon the *Noerr* and *Pennington* decisions of this court (*Eastern Railroad Presidents Conference v. Noerr,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965)), which hold that the Sherman Act was not intended by Congress to extend to joint appeals to governmental bodies, Judge Sweigert concluded that the First Amended Complaint failed to state a claim upon which relief could be granted, even assuming an overriding purpose to injure and destroy in ways unrelated to the actions of the regulatory bodies.

Judge Sweigert rejected the argument of plaintiffs that the *Noerr-Pennington* doctrine does not extend to activi-

ties conducted through the procedural machinery of the courts or of regulatory agencies like the California PUC or the ICC in which certain quasi-judicial functions are vested. He recognized that *Noerr* and *Pennington* speak in terms of the "legislative" and "executive" branches there involved, but he concluded that the rationale of those cases is equally applicable to activities directed to the courts or to regulatory agencies for the purpose of taking positions on points of fact or law pertinent to the regulatory acts. (Jt.App. 33). He observed that the right of access to courts and regulatory agencies is as much a political right as the right of access to the legislative and executive branches, that both the ICC and PUC Acts are framed in such a manner as to invite intervention by members of the regulated industry, and that such agencies encourage such intervention to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect one-sided proceedings. (Jt.App. 34.)

Judge Sweigert rejected the plaintiffs' argument that defendants' activity was "mere sham" and therefore within the dictum of *Noerr* that joint appeals to governmental bodies might fall outside the *Noerr* immunity if such appeals were "mere sham". He pointed out that the First Amended Complaint "carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity." (Jt.App. 35.) He therefore concluded that the oppositions were not sham but genuine. (Jt.App. 36.)

Respecting the alleged deterrent effect upon plaintiffs and others in like position arising from defendants' activities, Judge Sweigert stated the gist of the allegations to be that the protests by defendants before the regulatory agencies and courts have had the effect of putting plaintiffs to the proof in support of their applications and thereby made it "exceedingly expensive" for plaintiffs and others to obtain certificates." (Jt.App. 37.) He concluded that such effect should not be held to take away the immunity of *Noerr*, in the following words:

> "Unfortunately, proceedings before courts or regulatory agencies, if opposed, entail expense in terms of time and money for both sides . . . this is inherent . . ." (Jt.App. 37.)

On the subject of bad motive he stated:

> "Whatever the law may be without *Noerr*, the Supreme Court has resolved the problem of bad purpose or intent *vis-a-vis* freedom of resort to public officials and agencies by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competitive purpose of such resort and a possible anti-competitive result." (Jt.App. 36.)

4. Reasoning of Two-Member Majority of Court of Appeals

The Court of Appeals, per Circuit Judge Browning and designated District Judge Pregerson, reversed the District Court. To reach this result they construed the *Noerr-Pennington* immunity as not extending to "concerted employment of judicial and administrative processes" (Jt. App.47). They argued that the *Noerr-Pennington* immunity should not apply to "agreements to utilize judicial and administrative processes", as opposed to "joint ef-

forts to influence legislative and executive actions" because administrative agencies in considering applications for certificates of public convenience and necessity, and the courts in reviewing administrative action, do not have a need similar to that of the legislature or executive for information and opinion. (Jt.App. 49-50.) They argued that administrative bodies and reviewing courts are not engaged in determining whether laws should be adopted or enforced but merely in "adjudicating". The majority elaborated by saying in a footnote that judicial and administrative adjudicators "do not act in a representative capacity" and that "There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions." (Jt.App. 52.)

The majority's alternative proposition was that even if they were wrong in limiting the *Noerr-Pennington* immunity as set forth above, the complaint alleges that defendants' real purpose was to restrain trade directly, rather than through the medium of governmental action, and that such purpose brings the complaint within the "sham" exception stated by way of dictum in *Noerr*. (Jt. App. 54-59.) The majority argued that the complaint in alleging an intent to deter plaintiffs and others in like position from seeking certificates alleges a purpose to preclude action by the governmental agencies and that in such situation the protests to the governmental agencies must be treated as "sham", however genuine and honest the efforts of defendants to support all protests as effectively as possible. (Jt.App. 58, 59.)

5. Reasoning of Dissenting Senior Circuit Judge Hamlin

Judge Hamlin agreed with the reasoning of Judge Sweigert of the District Court (Jt.App. 60, 61) and added supporting comments.

He observed that implementation of the broad statutory standard of "public convenience and necessity" is one akin to policy making, and that in exercising its judgment in implementing such statutory standard in an individual case the administrative agency is largely dependent upon information supplied not only by the applicant but competing carriers. Under these circumstances he would hold that the immunity of *Noerr-Pennington* should apply. (Jt.App. 60, 61.)

He would hold that any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates should be dealt with by the agency which has power and ability to correct such abuses, rather than by invoking the Sherman Act.

SUMMARY OF ARGUMENT

The District Court and the dissenting Senior Circuit Court Judge correctly concluded that the allegations of the First Amended Complaint, if accepted as true, nevertheless fail to state a claim under the federal antitrust laws as construed by this Court in *Noerr* and *Pennington* (*Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)).

1. What the Complaint Alleges

The substance of the complaint is that defendant carriers, possessing certificates of public convenience and necessity from the California PUC and ICC, made an agreement to carry out and publicize a jointly financed program of opposing, before the PUC, the ICC, and the appropriate federal or state courts, every application, irrespective of its merits, for a certificate of public convenience and necessity, or for the transfer or registration of such a certificate; that defendants made such agreement and implemented and publicized it for the purpose of weakening or eliminating existing or potential competitors in the following ways: depleting their resources; delaying the granting or transfer or registration of certificates; causing the denial or restriction of certificates because such rights would otherwise have been granted "because no opposition would otherwise have been commenced"; discouraging or deterring such competitors from initiating or pursuing applications. (Jt.App. 1-18.)

2. What the Complaint Does Not Allege

There is no allegation that defendants' efforts to influence the PUC, the ICC and the courts have ever been other than genuine, and no allegation that false or irrelevant evidence has ever been presented. There is no allegation that the PUC or the ICC or the courts have at any time lacked, or been prevented from exercising, full control over the extent to which they would allow defendants to protest and participate. There is no allegation that the PUC or the ICC or the courts have at any time been prevented from exercising full control over their determinations on the merits. Finally, there is no allegation

that defendants agreed between themselves that if any one of them should seek additional certificated authority the others would refrain from protesting.[4]

3. The Rationale of Noerr and Pennington Precludes Sherman Act Liability

The language and the rationale of *Noerr* and *Pennington* require the conclusion that the Sherman Act does not extend to the facts alleged. In those cases this Court held that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, even though inspired by anti-competitive motives and even though accompanied by a hoped-for or indeed known incidental effect that such activities would produce "direct injury" to competitors.

The reasons for such conclusion were given by the Court in *Noerr* as follows:

a. Essential dissimilarity

The Court said that joining together to attempt to persuade the legislature or the executive to take particular action with respect to a law is "essentially dissimilar" from the kind of combination Congress had in mind when it enacted the Sherman Act. Congress was legislating basically with respect to combinations which would amount to common-law trade restraints such as agreements to help one another take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts and market-division agreements.

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[4]In fact, several of the defendants have sought additional authority and have met with vigorous opposition from the others. E.g., Walkup's Merchants Express, PUC Application No. 47472 (1965); Pacific Motor Trucking Company, ICC Docket No. MC 78786 (Sub No. 268) (1967).

Noerr involved efforts by a group of railroads with anti-competitive intent to influence the legislature, the governor, and law enforcement officers to take certain restrictive action against truckers. The sole object was to hurt the truckers in every way possible, including the destruction of their goodwill. *Pennington* involved efforts with anti-competitive motive against small coal operators, by a union and major coal operators to persuade the Secretary of Labor to obtain establishment of high minimum wages for employees of contractors selling coal to the TVA, and efforts to persuade TVA officials to curtail spot market purchases. The facts alleged in the present case are essentially similar to those in *Noerr* and *Pennington*. They involved efforts, with anti-competitive motive, by one group of truckers against another, to persuade the ICC, the PUC and the reviewing courts to refuse to grant certificates or transfers thereof. The alleged intent was not only to influence the governmental officials but to discourage would-be applicants from filing or pursuing applications for certificates.

b. Need of Public Officials for Information

Noerr said the Sherman Act should not be extended to influence governmental officials vested with power to make determinations which would be in restraint of trade. While *Noerr* involved efforts to influence legislators and a governor, as well as law enforcing officers, *Pennington* applied the *Noerr* holding to efforts to influence the Secretary of Labor and the administrators of the Tennessee Valley Authority. An important reason given in *Noerr* was that public officials need to have the very kind of information and views which competitive interests can

furnish if such officials are to make determinations responsive to the public interest in the area of governmentally-imposed trade restraints. To extend the Sherman Act to efforts of competitors to influence those officials would dry up a valuable source of information.

In the present case, the ICC and PUC need to have the information and views of existing certificate holders in order to make determinations in the area of granting or withholding or transferring certificates of public convenience and necessity. The Ninth Circuit majority failed to take cognizance of the fact that the granting or denying of certificates of public convenience and necessity is not a mere fact finding function but requires the exercise of judgment within very broad boundaries, calling for the consideration of many factors, economic, political and social, and the development of policy within such boundaries. In this area in which public interest is the guide, the ICC and PUC must be receptive to the information and views of existing certificate holders if such bodies are to carry out their obligations in a manner fully responsive to the public interest.

The statutes governing the ICC and PUC, and the rules promulgated by those bodies, encourage existing certificate holders to participate in all certificate proceedings, subject to such procedural limitations as those bodies prescribe. The complaint recognizes that during the whole period covered by the complaint, covering several years, the information and views of defendants were indeed considered to have value by the ICC and PUC and did have an influence upon final determinations. There is no allegation that plaintiffs sought during any of the

period in question to have the ICC or PUC exclude the participation of defendants.

c. Existing Certificate Holders Occupy a Position of Public Trust

The holders of certificates of public convenience and necessity have assumed the obligations of a public utility and have public utility status. They may not pick and choose customers, but on the contrary must serve without discrimination; they may not change rates at will; they may not even go out of business at will. They have a continuing obligation to provide service under conditions acceptable to the Commission. Since they have an obligation to *maintain and perpetuate* their service in the public interest, they have a continuing concern, both for themselves and on behalf of the public, in the certificating process. Thus they have been given a recognized standing in all certificate proceedings. They represent not only their self-interest but the public interest as well and thereby occupy a position of public trust, even stronger than that of a "private attorney general." See *Seatrain Lines, Inc. v. United States,* 152 F.Supp. 619, aff'd 355 U.S. 181 (1957). It is not surprising that during all the period covered by the complaint their participation was allowed by the ICC and PUC, and that their views did influence the decisions of those bodies.

d. First Amendment Right to Assemble and Petition May Not Be Infringed

In addition to the reasons of "essential dissimilarity" and the need of governmental officials to have the information and views of those with anti-competitive interest, another reason given in *Noerr* for holding that the

Sherman Act should not be extended to joint efforts to influence public officials was that otherwise a serious question of infringement of First Amendment rights would arise. With this in mind the Court invoked the principle of statutory construction that Congress is presumed to have chosen to avoid constitutional dangers. Thus, the Court did not have to decide the constitutional question, although it strongly suggested that a contrary interpretation of the Sherman Act would infringe First Amendment rights. As in *Noerr*, so here the presence of the constitutional issue together with other factors is enough to decide that the Sherman Act does not apply.

If the constitutional issue were reached, defendants contend that infringement would indeed result. The alleged participation of defendants in all certificate proceedings was a form of political expression protected by the First Amendment. Such participation was a means of seeking to achieve governmental determinations, based upon public interest, that additional certification would run contrary to public convenience and necessity. Such participation was not for the resolution of private differences, since there is no such thing as a right to receive a certificate, nor is there such a thing as a right by existing certificate holders to keep others from receiving certificates. The activities of defendants fall within the reasoning of this Court in *NAACP v. Button*, 371 U.S. 415 (1963) and subsequent cases.

There is no justification for the Ninth Circuit majority's conclusion that in applying a balancing test, First Amendment protection in the instant case must give way to the antitrust policies of the United States.

The Ninth Circuit failed to recognize that certificate proceedings deal exclusively with an issue of *public interest* in which defendants have a special concern because of their public utility obligation. Any restraint of trade is the result of governmental action imposed in the public interest.

The Ninth Circuit would draw an indistinct line between "probable case" and lack thereof, as a basis for determining whether the Sherman Act applies to joint protests of defendants in certificate proceedings. Aside from the fact that the concept of "probable cause" has no proper application in certificate proceedings, concerned as they are with public interest determinations rather than the resolution of private rights, the absence of a clear, bright line between lawful and unlawful participation would produce a chilling effect upon the exercise of First Amendment rights. That is enough to condemn the Ninth Circuit's interpretation and make the Sherman Act, as thus applied, unconstitutional.

e. The Alleged Facts Do Not Fall Within the "Sham Exception" of Noerr

Noerr suggests in a dictum that "there may be situations in which a publicity campaign, ostensibly directed toward governmental action, is a mere sham to cover what is nothing more than an attempt to interfere directly with business relationships . . .". 365 U.S. at 144. The Court made clear that if the efforts to influence governmental officials are genuine in the sense that there is an intent to influence such officials, it is immaterial that there may be an additional intent to destroy the goodwill of the

competitor. *Pennington* expressly states that *Noerr* shields from the Sherman Act concerted effort to influence public officials "regardless of intent or purpose". 381 U.S. at 670.

In the present case the complaint concedes that there was a genuine intent to influence the ICC and PUC and the reviewing courts in making their determinations in certificate matters. Thus the fact that the complaint can be interpreted to allege an additional intent, viz., to discourage and deter would-be applicants from seeking certificates, is irrelevant.

The Ninth Circuit majority rejected the sham exception of *Noerr*, and created one of its own, under which a multiplicity of intents must be weighed. The Ninth Circuit conceded that the alleged intent to influence the ICC and PUC was genuine, but it construed the complaint to allege that the other alleged intent, viz., to discourage would-be applicants from seeking certificates, was "primary" and therefore rendered the first intent "sham", thus bringing defendants' activities under the Sherman Act.

Defendants point out that such Ninth Circuit majority's sham exception would have the same infirmities as its main holding. It would dry up the furnishing of information needed by governmental officials, and it would infringe First Amendment rights. Once again there would be no clear, bright line providing a guide between Sherman Act violation and lawful joint approaches to governmental bodies. The test would be to determine which intent is "primary", an esoteric speculation that even the persons making such joint approaches would find it difficult to

weigh. A chilling effect upon the exercise of First Amendment rights would be inevitable.

f. The Rule of Reason in Construing the Sherman Act Requires Exemption From Its Terms Upon the Facts Alleged

The Sherman Act should not be stretched to cover every alleged abuse. The rule of reason which has long been applied in construing the boundaries of the Act dictates that the alleged abuses can best be left to the good judgment and effective disposition of the ICC and PUC. Those bodies have full power over their procedures and comprehensive substantive regulation of certificated carriers. Their decisions in certificate matters fall under the principle that where a restraint is the result of valid governmental action, as opposed to private action, there is no Sherman Act violation. Their decisions are made with independence of judgment. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *Parker v. Brown*, 317 U.S. 341 (1943).

Since agency supervision of the alleged anti-competitive conduct is so complete, there is no justification for stretching the antitrust laws to apply.

g. Review of Lower Court Authorities

A summary is set forth reviewing the more significant decisions since *Noerr*. None of them has limited the *Noerr-Pennington* immunity in the way suggested by the Ninth Circuit. One of them, *Association of Western Railroads v. Riss*, 299 F.2d 133 (C.A.D.C. 1962) held that *Noerr-Pennington* shields applications to the ICC with respect to its function of certificating interstate carriers.

h. Conclusion

For all of the reasons set forth above the decision of the Ninth Circuit should be reversed and the complaint dismissed.

ARGUMENT

Each of the reasons given by the Court in *Noerr* and *Pennington,* for holding that the Sherman Act does not extend to joint efforts with anti-competitive motive, to influence governmental officials, applies with at least equal force to the facts alleged in the complaint. Those reasons, which are considered in detail below, are that: (1) such activities are "essentially dissimilar" from the trade-restraint activities intended to be covered by Congress; (2) extension of the Sherman Act to forbid joint efforts to influence governmental officials would dry up a source of information which governmental officials need if they are to exercise their authority in an adequately informed manner; and (3) extension of the Sherman Act to forbid joint efforts to influence governmental officials would raise the question of infringing the First Amendment right to assemble and petition. The Court expounded further in *Noerr* as follows:

(4) Since motive is irrelevant to the conclusion, the Sherman Act does not apply even if the *sole* purpose, in seeking to influence governmental action, is to destroy the competition. Thus, if the present complaint is construed to allege a sole purpose to destroy plaintiff truckers and others in like position, that allegation is not effective to change the conclusion that the Sherman Act is inapplicable.

(5) Similarly the Court in *Noerr* stated that its conclusion would not be altered by the presence of an intent to do more than merely seek to influence governmental action, viz., an intent to destroy the competition through the destruction of its goodwill even though no legislation was secured; such infliction of direct competitive harm would be an expected, and indeed intended, indirect result of efforts to influence governmental officials. The allegation in the present complaint that the defendants intended to do more than merely seek to influence governmental action, viz., to deter would-be applicants from seeking certificates, falls in the same category; such deterrence would be an allegedly expected and intended indirect result of efforts to influence governmental officials, and *Noerr* immunity should not be affected.

(6) Finally the Court in *Noerr* stated that the use of deceptive methods in seeking to influence governmental officials would not change the result since the Sherman Act is not concerned with ethics as such. In the present case that issue does not arise at all since there is no allegation or suggestion that the efforts to influence governmental bodies were other than honest.

(7) After reaching its conclusion of Sherman Act immunity the Court in *Noerr* went on to say by way of dictum that "there may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relations of a competitor and the application of the Sherman Act would be justified". 365 U.S. at

144. It will be shown that such "sham" exception has no proper application to the acts alleged in the complaint.

Each of the foregoing seven items is discussed below along with additional considerations leading to the conclusion that no Sherman Act violation is alleged by the present complaint.

I. ESSENTIAL DISSIMILARITY: THE ACTS ALLEGED ARE "ESSENTIALLY DISSIMILAR" FROM THOSE INTENDED TO BE COVERED BY THE SHERMAN ACT

In *Noerr* the joint activity of the defending railroads consisted of hiring a public relations firm to conduct a publicity campaign against plaintiff truckers. The campaign was designed to foster adoption and retention of laws and law enforcement practices destructive of the trucking business. It included efforts to influence the legislature to adopt or retain certain laws and to influence the governor to veto unfavorable legislation. It also included efforts to persuade law enforcement agencies to enforce certain existing laws more rigidly.

Upon these facts this Court reversed the court below and held that the Sherman Act did not extend to such "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly". 365 U.S. at 136.

The first reason given in *Noerr* for holding such "political activities" outside the Sherman Act was their "essential dissimilarity" from the agreements traditionally condemned by Section 1 of the Sherman Act, viz., common

law trade restraints—combinations ordinarily characterized by an agreement of the participants to give up their trade freedom or help one another take trade freedom from others through such devices as price-fixing agreements, boycotts, market-division agreements and the like. 365 U.S. at 136."

In *Pennington* the alleged joint activities of the defending union and major coal operators consisted of an agreement to take various steps to exclude the marketing, production, and sale of non-union coal. The agreement included a joint approach to the Secretary of Labor to persuade him to obtain establishment under the Walsh-Healy Act of a minimum wage for employees of contractors selling coal to the TVA which would make it difficult for small companies to compete in the TVA "term contract" market; it also included a joint urging of TVA officials to curtail spot market purchases, a substantial portion of which were exempt from the Walsh-Healy order.

A verdict for antitrust violation was given, and was sustained by the Court of Appeals. This Court reversed, holding that neither the trial court nor the Court of Appeals had taken proper account of the *Noerr* case. This Court, per Mr. Justice White, said (381 U.S. at 670):

> "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."

The *Pennington* case establishes that the sweep of the *Noerr* exclusion extends beyond the "political activity" of seeking to secure or defeat legislation through appeals to the legislature and the governor and includes "concerted efforts to influence public officials", specifically attempts to persuade governmental executive officials and administrative agencies to take certain action which would have an anti-competitive effect. As in *Noerr* there is "essential dissimilarity" from common-law trade restraint activity.

The present complaint, like *Pennington,* involves alleged efforts to influence public officials to take certain action within the bounds of their discretionary authority which would have an anti-competitive effect, such officials being the members of two administrative agencies regulating public utilities, viz., the ICC and the PUC, and the courts reviewing the work of those agencies.

The alleged activities in the present complaint must be deemed "essentially dissimilar" from the activities intended to be condemned by the Sherman Act since they are truly "essentially" *similar* to the activities considered by this Court in the *Noerr* and *Pennington* cases. The activities alleged are simply concerted applications to public officials vested with power to take trade-restrictive action. This essential similarity will become more apparent from the material which follows elucidating the certificating functions of the ICC and PUC.

In *Noerr* this Court said that even if the element of "essential dissimilarity" is not of itself conclusive on the question of the scope of the Sherman Act, it is conclusive if "considered along with the other difficulties that

would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws". 365 U.S. at 137. The first of these difficulties relates to the need of governmental officials for information and is discussed in the following section. The other difficulty, involving First Amendment rights, is discussed thereafter.

II. NEED OF PUBLIC OFFICIALS FOR INFORMATION FURNISHED BY ANTI-COMPETITIVE INTERESTS: EXTENSION OF THE SHERMAN ACT TO FORBID JOINT EFFORTS TO INFLUENCE GOVERNMENTAL OFFICIALS WOULD DRY UP A SOURCE OF INFORMATION WHICH SUCH OFFICIALS NEED IF THEY ARE TO EXERCISE THEIR AUTHORITY IN AN ADEQUATELY INFORMED MANNER

This Court in *Noerr* stated that inclusion in the Sherman Act of joint solicitation of governmental action with respect to the passage or enforcement of laws:

> ". . . would substantially impair the power of government *to take actions* through its legislature and executive *that operate to restrain trade.*" (Emphasis added.) 365 U.S. at 137.

This "substantial impairment" was considered an important and significant factor in construing the intended scope of the Sherman Act. *Noerr* speaks in terms of influencing the legislature and the governor because those were the entities there involved. But *Pennington* makes clear that the rationale of *Noerr* extends as well to the influencing of other public officials, including administrative agencies, with power to take restrictive action in the public interest.

The concept is that in making determinations involving judgment based upon a variety of factors, governmental officials should not be precluded from receiving useful information contributing to their expertise in making decisions responsive to the public interest, and that persons with competitive motive are often the very ones whose information and opinions can be most useful to a proper decision. Their competitive activity places them in a position of having special knowledge, and their motivation to come forward is strong. The advantage to government of having this source of information available outweighs antitrust considerations.

This is the point at which the Ninth Circuit majority adopted a narrow interpretation of *Noerr-Pennington* and drew distinctions which, defendants submit, are not justified by the rationale of those cases.

First the Ninth Circuit seemingly adopted the view that the doctrine of *Noerr-Pennington* applies only to elected officials. (Jt.App. 51, 52, footnote 6.) In the light of *Pennington* there is no valid basis for such conclusion. *Pennington* involved appeals to the Secretary of Labor and the TVA. Contrary to the statement in the above footnote, not only elected but appointed officials can act "in a representative capacity", as in those instances where they are called upon to make discretionary determinations in the public interest.

Next the Ninth Circuit majority undertook to narrow *Noerr-Pennington* by saying that Sherman Act immunity applies only when the public officials, sought to be influenced, are vested with authority to determine (a) whether laws restraining trade will be adopted, or (b)

whether such laws having been adopted will be enforced. (Jt.App. 49, 50.) There appears to be no rational basis for such a limitation. It is not only officials such as legislators empowered to determine whether laws restraining trade should be adopted, or executives empowered to determine whether such laws being adopted should be enforced, but appointed officials charged with the duty to determine the way in which such laws should be implemented, who benefit from the information and views of those having a competitive interest. They benefit in the sense that they can with greater certitude make decisions which are responsive to each element within their proper sphere of consideration.

Next the Ninth Circuit undertook to narrow the *Noerr-Pennington* immunity by saying that the work of the ICC and PUC in certificate matters is simply "adjudication" and that the information and opinions which defendants can furnish are not relevant to the determinations of such governmental bodies. (Jt.App. 49, 50.) Defendants submit that regardless of whether the certificating function be designated "adjudication" or by some other name, it is serious error to conclude that the information and views of existing certificate holders are irrelevant to the determinations made by the ICC and PUC. The Ninth Circuit simply failed to take cognizance of the broad discretionary aspect of the certificating function which makes such information and views highly relevant. If those governmental officials charged with administration of the certificating function were denied such information and views, they would be substantially impaired in reaching decisions responsive to all elements

within their proper sphere of consideration. Therefore, the Sherman Act should not be extended to include the joint efforts described in the complaint.

The subsection which follows describes the nature of the certificating function and the great breadth of considerations relevant to determinations within the language "public convenience and necessity".

A. The Granting or Denying of Certificates of Public Convenience and Necessity Requires the Exercise of Judgment Within Very Broad Boundaries, Calling for Consideration of Many Factors, Economic, Political and Social, and the Development of Policy Within Such Boundaries.

The term "public convenience and necessity" does not connote an absolute which can be determined simply by marshaling and applying facts, as the Ninth Circuit majority suggests (Jt.App. 50, footnote 4). On the contrary, as subsequent citations will show, the term is purposefully broad and was used by Congress to enable the ICC, and was used by the California legislature to enable the PUC, to make determinations in the public interest as of any given time in the light of the whole spectrum of economic, political and social conditions then prevailing. *Public interest* has been described as the unbroken thread which must guide the commission in making each determination. *San Diego & Coronado Ferry Co. v. Railroad Commission,* 210 Cal. 504, 509, 292 P. 640, 641, 642 (1930).

Despite the above considerations the Ninth Circuit majority characterized the work of the ICC and PUC as "adjudicative". (Jt.App. 50, footnote 4.) It noted the Administrative Procedure Act provisions relating to li-

censing, and it said that the PUC is concerned with facts—"experience, financial ability, available equipment". (Jt.App. 50, footnote 4.) No mention was made of the broad economic, political and social aspects which the Commission must take into consideration.

While "adjudicative" may be the correct word to describe the fact that the ICC and PUC observe *procedures* which are similar to those of courts, and to describe the fact that an order or opinion is rendered, such adjective should not be used to divert attention from the essential nature of the *substantive* aspect of the commission's function.

In a real sense a commission charged with the issuance of certificates of public convenience and necessity is performing a legislative function delegated by the legislature within a very broad framework permitting of wide discretion and requiring agency determination of policy. The Commission does in fact make policy on a case-by-case basis,[5] although it may also determine policy in a general rule-making proceeding. The dissenting Senior Judge Hamlin of the Ninth Circuit correctly stated that "the activity of the Public Utilities Commission in the implementation of the broad statutory standard is one akin to policy making". (Jt.App. 60.)

The broad discretion lodged in the PUC and ICC is particularly significant in the motor carrier field because the nature of the operation permits of wide differences of view respecting the extent of competition required by the public interest. Whereas certification of a telephone or

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[5]For example, see *Walkup's Merchants Express*, 66 Cal. PUC 578 (1966); *Peninsula Motor Express*, 49 Cal. PUC 807 (1950).

a gas or an electric utility normally presupposes that public convenience and necessity requires a complete monopoly in a given area, thus limiting the enquiry mainly to a determination whether the applicant is fit, willing and able (or if several applicants are competing for the same area determining which of them is the most fit, willing and able), certification of motor carriers may range, as determined by the public interest, all the way from complete monopoly to almost unlimited competition. The constantly recurring problem for the PUC and ICC, arising with each application, is to determine how extensive the competition should be in the area under consideration, in the light of economic, political and social conditions then prevailing. Neither the ICC nor the PUC has ever attempted to state how much or how little competition it deems to be in the public interest in a given location at a given time although there have been PUC general policy decisions from time to time stating that because of the conditions then prevailing the commission would look with favor upon certificate applications for a short period and then revert to a more restrictive attitude.[6] By and large, however, each commission has determined the degree of liberality or restrictiveness on a continuing, *ad hoc*, basis with each application.

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[6]In *Investigation of Carriers of Property*, 48 Cal. PUC 62 (1948), supplemented by 48 Cal. PUC 587 (1949) the PUC indicated it would look with favor upon certificate applications by those carriers holding permit rights but probably operating beyond their permit authority, the thought being that by such liberal attitude a difficult enforcement problem would be overcome and a more effective regulation achieved. See Lakusta, *Regulation of Truckers for Hire in California*, 41 Calif.L.Rev. 63, 79-82 (1953). The policy failed and several years later the PUC in *Investigation of Regulation of Carriers of Property*, 53 Cal. PUC 366 (1954) announced that it would look with favor upon certificate

The complaint alleges that prior to the commencement of consistent protesting by defendants in 1961 the PUC granted certificates and transfers of certificates "liberally". (Jt.App. 11.) It then alleges that defendants sought to "thwart the policy and aims of the PUC in liberally granting operating rights". (Jt.App. 12.) Such allegation makes the assumption which is legally unsound that a liberal policy once adopted may not be questioned, and the agency itself may not change it. The fact is that the PUC has a continuing legal duty to consider all relevant factors in each case and to alter policy as public interest dictates. While the complaint falls short of alleging a *right* on the part of plaintiffs to a continued liberal policy by the PUC, the Ninth Circuit takes the implication of such a right and treats it as an alleged right bearing upon the issue whether defendants' alleged protests were valid. (Jt.App. 56.)

In the same vein the Ninth Circuit majority refers to the complaint's allegation respecting registration of certificates and states that the allegation in substance is: "Until 1963 it was the policy of the ICC to register any certificate issued by the PUC automatically, without further hearing." (Jt.App. 56.) The implication is that defendants sought to change a firm policy, in the nature of a right, and that the validity of defendants' protests is therefore called in question. Once again the Ninth Circuit

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applications *filed within 90 days* of the decision by those carriers then holding permitted rights but concerned lest they were operating beyond their permitted authority. See Poe, *Regulation of Highway Carriers in California*, 30 So.Calif.L.Rev. 131, 143-146 (1957). The implication was that after the period of grace the Commission would revert to a more restrictive view of public convenience and necessity.

majority relies upon a legally unsound premise. Indeed there never was an ICC policy respecting the registration of PUC rights to obtain commensurate ICC rights. An examination of the Interstate Commerce Act would reveal that the change in registration practices was not because of a change in policy or of anything defendants did to change a policy but because of the October 15, 1962 amendment to the Interstate Commerce Act which *abolished* the right of automatic registration and required a finding henceforth of public convenience and necessity respecting the inter as well as intrastate portion of a proposed certificate before it could be registered. The statutory provision, as amended, 49 U.S.C. §306(a)(6), is reproduced on pages vii and viii of the Attached Appendix.

We turn to selected cases, out of the great number of available decisions, describing the nature of the certificating function. Such cases establish the correctness of the comments made hereinabove.

B. The ICC and PUC Are Vested With Broad Discretionary Authority to Determine the Proper Administration of a Legislative Scheme Involving Restraints of Trade.

1. Certification By the Interstate Commerce Commission.[7]

In *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945) this Court stated:

> "Public convenience and necessity is not defined by the statute [Interstate Commerce Act]. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding

[7]The relevant statutory provisions are set forth in the Attached Appendix, pp. iii-x.

> the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920 . . . Such use indicated a continuation of the administrative and judicial interpretation of the language. . . . The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the *exercise of its judgment* to determine public convenience and necessity. This Court approved this construction. . . . The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. . . . This, of course, gives *administrative discretion* to the Commission . . . *to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.*" (Emphasis added.)

This Court used similar language a short time later in *United States v. Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945), per Mr. Justice Douglas, as follows:

> "The Commission is the *guardian of the public interest* in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted *with a wide range of discretionary authority.* Interstate Commerce Commission v. Parker, 326 U.S. 60, 89 L.Ed. 2051, 65 S.Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them *but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies.*" (Emphasis added.)

These two cases were preceded 5 years earlier by *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940) in which the similar phrase "public convenience, interest, or necessity" was involved. Justice Frankfurter wrote (309 U.S. at 137, 138):

> "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the *complicated factors for judgment* in such a *field of delegated authority* permit, it serves as *a supple instrument for the exercise of discretion* by the expert body which Congress has charged to carry out its legislative policy." (Emphasis added.)

Lower federal courts have followed the above decisions.[8]

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[8]Reference may be made particularly to the following: *Delaware Coach Co. v. Delaware Public Service Commission*, 265 F. Supp. 648 (D. Del. 1967); *Indianhead Truck Line, Inc. v. United States*, 253 F.Supp. 186 (D. Minn. 1966), Blackmun, J., participating; *Youngblood Truck Lines, Inc. v. United States*, 221 F.Supp. 809 (W.D. N.C. 1963); *Worster Motor Lines, Inc. v. United States*, 226 F.Supp. 603 (W.D. Pa. 1963); *North American Van Lines Inc. v. United States*, 217 F.Supp. 837 (N.D. Ind. 1963); *Burlington Truck Lines Inc. v. Interstate Commerce Commission*, 194 F.Supp. 31 (S.D. Ill. 1961) reversed on other grounds, 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed. 207 (1962); *Virginia State Lines v. United States*, 48 F.Supp. 79 (W.D. Va. 1942). In the *Delaware Coach Co.* case cited above, the court said (265 F.Supp. at 652, 653):

> "The term 'public convenience and necessity' has long been recognized as a term of art, the application of which involves the exercise of administrative discretion. For this reason courts have invariably held, when confronted with the issue, that *the granting or withholding of certification to a public utility is a legislative function.*" (Emphasis added.)

The fact that the regulatory commission is not bound to a policy once determined but, on the contrary, has the obligation to alter the policy if public interest indicates, is expressed in the *Youngblood* case, *supra,* as follows (221 F.Supp. at 818):

> "The Interstate Commerce Commission, in the exercise of its administrative authority and discretionary judgment, not only can promulgate standards for determining public convenience and necessity, but *is free to alter its policies and standards when the necessity, in its judgment, arises.*" (Emphasis added.)

Similarly in the *Worster Motor Lines* case, *supra,* the court said (226 F.Supp. at 608):

> "It must not be overlooked that the Interstate Commerce Commission under the law acts on a finding of public convenience and necessity. This necessarily implies that the necessity of the public *may change from time to time.* The Commission, therefore, is not ruled by res judicata as that term is used by courts as a rule of precedence . . .' . . . an administrative agency *is not bound by its own prior determinations,* though the courts may take these prior determinations into consideration.' State Airlines, Inc. v. Civil Aeronautics Board, 84 U.S.App.D.C. 374, 174 F.2d 510, 518 (1949)." (Emphasis added.)

To somewhat similar effect is the language in *Virginia State Lines, supra,* (48 F.Supp. at 83):

> ". . . the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since '*The stuff of the process is fluid and changing*—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy

> to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems'. Board of Trade of Kansas City v. United States, 1942, 314 U.S. 534, 546, 62 S.Ct. 366, 372, 86 L.Ed. 432." (Emphasis added.)

The very broad range and freedom of the Commission in exercising its discretion in the certificating process is noted in the following language in the *Burlington Truck Lines* case, *supra*, (194 F.Supp. at 48):

> "The courts, in numerous decisions, have held that the commission has a broad discretion in determining the issue of public convenience and necessity under Section 207(a) of the Interstate Commerce Act . . . This issue is a matter requiring the exercise of the commission's expert judgment in the field of transportation. . . . In the exercise of this administrative function *there are no specifications of consideration by which the Commission is to be governed* in determining whether or not public convenience and necessity requires the inauguration of motor carrier service." (Emphasis added.)

2. Certification by the California Public Utilities Commission.[9]

Turning to California the decisions are equally clear in stating the principles delineated above. In *Sale v. Railroad Commission*, 15 Cal.2d 612, 104 P.2d 38 (1940), the California Supreme Court described the California PUC and its functions in the following terms (15 Cal. 2d at 617, 618, 104 P.2d at 41):

> ". . . Created by the Constitution in 1911, the commission was designed to protect the people of the

[9]The relevant statutory provisions are set forth in the Attached Appendix, pp. xix-xxiv.

> state from the consequences of destructive competition and monopoly in the public service industries. . . . Although it has been termed a 'quasi-judicial' tribunal in some of its functions, its powers and duties go beyond those exercised by the judicial arm of government. . . . A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.
>
> "The powers and functions of the railroad commission are vastly different in character. *It is an active instrument of government charged with the duty of supervising and regulating public utility services* and rates. . . . The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the *right and duty* to make its own investigations of fact, to initiate its own proceedings and in a large measure *to control the scope and method of its inquiries.*" (Emphasis added.)

This language sets forth in clear terms the fact that the commission has an obligation going beyond the passive function of determining rights in cases presented to it. Its substantive activity, at least so far as the granting or denying of certificates is concerned, is more akin to the legislative than the judicial function. As the California Supreme Court said in *California Motor Transport Co. v. Railroad Commission,* 30 Cal.2d 184, 187, 180 P.2d 912, 914 (1947):

> "The power granted to the commission in issuing certificates of public convenience and necessity is very broad".

There is language to similar effect in *Southern California Edison Co. v. Railroad Commission,* 6 Cal.2d 737, 748, 59 P.2d 808, 813 (1936):

> "There is another field of *extensive scope* in which the respondent commission exercises its powers . . . In this field are the executive and administrative orders of the commission in connection with which the commission exercises a wide discretionary power, such as in the granting, withholding, and cancelling of permits [certificates] . . ." (Emphasis added.)

See also *San Diego & Coronado Ferry Co. v. Railroad Commission,* 210 Cal. 504, 511, 512, 292 P. 640, 643 (1930).

While the labelling of the certificating function should be accorded little significance in itself[10] the very broad discretionary authority delegated to the PUC by the legislature's use of the term public convenience and necessity no doubt led to the comment by the former chief counsel of the PUC that the certificating function is legislative in nature. Everett C. McKeage, PUBLIC UTILITY REGULATORY LAW, 107 (1956).

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[10]Judge Friendly commented as follows in his article, *"The Federal Administrative Agencies: The Need For Better Definition of Standards"*, 75 Harv.L.Rev. 863, 869 (1962):

> "Although I call the process of applying such standard [e.g., public convenience and necessity], . . . 'administrative adjudication', I have no intention of indulging in the sport, once so popular, of attempting to determine how far such action is judicial or legislative or executive, even 'softened with a *quasi*'. My litmus paper is not sensitive enough for me to do the job."

The next section deals with the need of governmental officials exercising the certificating function for the kind of information which existing certificate holders can and are motivated to furnish.

C. The Information And Views Of Existing Certificated Carriers Do Have Significant Value To The Public Officials Charged With The Certificating Function.

1. The Interstate Commerce Act and the California Public Utilities Code as well as the rules of the respective commissions encourage intervention by existing certificate holders.

Once it is recognized that the certificating function is not merely a fact finding activity but requires a delving into the infinite variety of circumstances, economic, political and social, which should be weighed in applying the test of public convenience and necessity if the regulatory body is to carry out its obligation of being "the guardian of the public interest" (as Mr. Justice Douglas put it in the *Detroit and Cleveland Navigation* case quoted on page 35 above), it becomes apparent that the public officials charged with the certificating function can derive information and views from existing carriers which will be of value in the crucible of relevant considerations. Failure to receive such information and views, under suitable procedural control of the agency, would amount to disregard of the obligation of governmental officials in a representative, democratic society.

Perhaps the most telling proof that the information and views of existing certificated carriers should be held to have value to the ICC and PUC in their respective deliberations, is that the relevant statutes contemplate intervention by existing certificate holders, and that the two

commissions have adopted rules under which such intervention may be made.[11]

The Interstate Commerce Act in 49 U.S.C. §304 obligates the ICC "to regulate common carriers by motor vehicle" and authorizes the establishment of requirements to achieve "continuous and adequate service", and authorizes the ICC to "obtain from such carriers . . . such information as the Commission deems necessary". The Act provides, in connection with applications for, or transfers of. certificates, that (§305(e)) "In accordance with rules prescribed by the commission, reasonable notice shall be afforded . . . to interested parties" and such section further provides that "opportunity for intervention . . . for the purpose of *making representations to the* commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties." There is a similar provision in §306 relating to the special situations in which Congress has delegated to state commissions the right to determine public convenience and necessity for interstate operations occurring geographically wholly within one state.

The rules promulgated by the ICC implement the statutory provisions. Under the Special Rules for Applications for Certificates of Public Convenience and Necessity (Rule 247, recited on pages xvii-xix of the Attached Appendix), there is provision for notice in the Federal

[11]The pertinent statutory provisions of the Interstate Commerce Act are set forth in the Attached Appendix, pages iii-x. The pertinent rules promulgated by the ICC are set forth on pages x-xix of such Appendix. The pertinent statutory provisions of the California Public Utilities Code are set forth on pages xix-xxiv, and the pertinent rules of the PUC, on pages xxiv-xxvii of such Appendix.

Register of the filing of the application, and there is a provision for the filing of protest. It is obvious that the Rules contemplate protests by existing certificate holders. Thus it is provided in Rule 247(d)(3) that:

> "A protest against any application shall set forth specifically grounds upon which it is made and contain a detailed statement of the protestant's interest in the proceeding (*including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application,* and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed), shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon . . ." (Emphasis added.)

The tenor of Rule 247(d)(5) also shows that the ICC contemplates intervention by existing certificate holders.

Turning to the situation in California the California Public Utilities Code in §701 gives the PUC broad regulatory power over every public utility, including every certificated carrier. More specific terms to the same effect are set forth in §1062. §1069 provides that every application for a certificate shall be accompanied by proof of service upon such interested parties as the commission requires.

In implementation of the pertinent provisions, which appear at pages xix-xxi of the Attached Appendix, the PUC's Rules of Practice and Procedure contain a number of provisions demonstrating that the PUC considers the intervention of existing certificate holders to be relevant.

Thus Rule 21 requires that applications for certificates contain "the names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named". There is a similar provision in Rule 37 relating to transfer applications. Rule 54 provides for the entering of an appearance and participation, to the degree permitted by the presiding officer, by anyone making a full disclosure and stating fairly the extent of interest and the position intended to be taken so long as the "contentions will be reasonably pertinent" to the issues raised by the application.

In both the ICC and PUC practice there are provisions establishing the right of anyone who has intervened and participated in a commission proceeding to seek review by way of rehearing, and also by court review. (Attached Appendix, pp. xii-xvi; xxii-xxiv.)

Defendants submit that Judge Sweigert of the District Court below correctly summarized the situation when he said (Jt.App. 34):

> "Both the ICC and PUC Acts, involved in the pending case, are framed in such manner as to invite intervention by members of the regulated industry and other interested persons in opposition to applications for certificates of the kind here involved. The regulatory agencies often encourage such intervention in order to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect mere one-sided proceedings."

2. The Complaint On Its Face Shows That The ICC And PUC (As Well As The Plaintiffs Themselves) Considered The Information And Views of Defendants Relevant, And The Complaint Concedes That The Agency Decisions Were Influenced By Defendants' Participation.

The complaint alleges consistent protests over an extended period beginning in early 1961 and continuing up to the filing of the amended complaint in 1967. There is no allegation that the ICC or PUC rejected such protests, either on their own initiative or on the motion of plaintiffs. Since each commission had full control of its procedures at all times (there is no allegation to the contrary) the inference may properly be drawn that each commission considered the information and views of defendants relevant. Indeed, one may infer that plaintiffs themselves conceded such relevance because there is no allegation that they ever sought to prevent defendants from participating in the proceedings, whether by petition to the ICC, the PUC, or the reviewing courts.

That defendants' participation did influence commission decisions is specifically conceded in the following words of the complaint (Jt.App. 10):

> "(10) The defendants, acting in concert, became capable of instituting opposition procedings . . . and have thereby defeated or restricted . . . rights . . . applied for . . . on the basis of decisions rendered on the merits of the issues presented. Such decisions which [sic], but for the defendants' combination and conspiracy would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced."

Plaintiffs do *not* allege that defendants were always able to convince the commission to act as defendants ad-

vocated. Plaintiffs have conceded the contrary. See Judge Sweigert's remarks. (Jt.App. 35.) The proper inference is that the commission weighed the information and views of defendants along with other relevant presentations and then exercised its expert judgment in each case.

D. Existing Certificate Holders Occupy A Position Of Public Trust In Coming Forward With The Presentation Of Relevant Information And Views.

In coming forward as protestants, existing carriers occupy a dual role: they represent not only their selfish interests but simultaneously the public interest and thereby occupy a position of public trust. By accepting a certificate they dedicate their service to the public. Such dedication imposes substantial burdens. Unlike businessmen engaged in non-public callings, they may not pick and choose their customers, keeping only those they prefer for economic or other reasons; they may not change their rates at will to meet competition; they may not even go out of business at will. They have a continuing public utility obligation to provide service, without discrimination, at rates determined by the commission, and with equipment and service conditions acceptable to the commission.

Since such carriers have the obligation to *maintain* their service in the public interest, it is reasonable to hold that they always have standing in certificate proceedings, with a right to participate, subject of course to such procedural rules as the commission sets down. The certificating process is a seamless web in which they are obligated to have a continuing interest, both for themselves and on behalf of the public.

The complaint alleges that defendants have consistently protested all applications "with or without probable cause, and regardless of the merits". (Jt.App. 7.) This amounts to no more than saying that defendants did not try to make their own private determinations of whether public convenience and necessity justified the certificating in question; on the contrary, they consistently volunteered whatever evidence and opinion in opposition to additional certification they could produce, leaving to the agency the ultimate determination. In this area where the elements of discretion and policy loom so large, the legal concept of "probable cause" really has no place. The PUC and ICC in granting or denying certificates do not adjudicate rights but simply determine whether a privilege should be conferred or withheld.

In carrying out their function of public trust in participating in certificate proceedings, existing certificated carriers can furnish not only factual information readily available to them respecting their respective operation, but information and opinions based on practical experience on such subjects as the effect upon service efficiency arising from a proliferation of certificates, the reaction of given segments of the shipping public to the presence of a new carrier, the problems of holding patronage, the manner in which new traffic can be generated, and the impact of varying degrees of competition upon rates. These and other subjects all have significance in assisting the commission to act in the public interest.

The position which existing certificate holders occupy in protesting certificate applications may be analogized to that of a "private attorney general". Ever since *FCC*

v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) there has been a growing recognition of the valuable role which can be played by those willing to come forward to express some facet of public interest even though lacking in the kind of "legally protected interest" standing traditionally required by the courts in earlier years. See for instance *Seatrain Lines, Inc. v. United States,* 152 F. Supp. 619, *aff'd* 355 U.S. 181 (1957); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965); *Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966).

In the *Seatrain* case, Seatrain having an anticompetitive motive sought to intervene before the ICC to protest the granting of an exemption from regulation similar to its own, to its competitor Pan-Atlantic. Intervention was allowed by the ICC and was approved by the district court which also recognized the standing of Seatrain to seek review of the ICC's action. The district court said (152 F.Supp. at 625):

> "Seatrain has alleged injury of a substantial character in the form of actual and projected losses of revenue due to the rate structure of Pan-Atlantic. Seatrain does not seek in this action a declaration that such rates are unjustified. *Rather, it seeks to protect the public interest by having the Commission base its decision upon findings under the National Transportation Policy.*" (Emphasis added.)

In the *United Church of Christ* case, the court of appeals, per Circuit Judge Burger, in holding that members of the public had standing in a proceeding before the FCC for a radio broadcast license, said (359 F.2d at 1002):

> "Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience."

The court went on to hold that it is no answer to say that the commission was directed by Congress to protect the public interest and could therefore act without benefit of outside information:

> "Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task. . . . The Commission of course represents and inded is the prime arbiter of the public interest, but its duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licensees." 359 F.2d at 1005.

The latest pronouncement reflecting recognition of value in participation by those with a legitimate interest is *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970) in which the Association was held to have standing to challenge a ruling by the Comptroller of the Currency that national banks could make data processing services available to bank customers and other banks. See also, Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 Harv. L. Rev. 255 (1961); Shapiro: *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721 (1968).

The complaint alleges that the defendants established a trust fund to finance their participation before the public bodies, with contributions from each defendant in proportion to its yearly gross income. The complaint further alleges that defendants agreed jointly to finance all opposition "which, if such opposition were not so financed, would not have been made at all because of the great expense involved in such a program of protests." (Jt.App. 6.) The effect of these allegations is to say that the defendants would have found it economically infeasible to participate and present their views had they not shared the costs. Such sharing cannot be condemned as an unlawful combination in itself, and given the element of public trust together with the other factors which weigh on the side of immunity from the Sherman Act, one must conclude that the sharing of costs only served to enable the defendants to act in the public interest. As the District of Columbia Circuit stated in the *United Church of Christ* (359 F.2d at 1006):

> "The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative procedings are such that even those with large economic interests find the costs burdensome."

Defendants submit that the public trust aspect of the standing of existing certificate holders in certificate proceedings provides a sound reason, in addition to those

set forth in *Noerr,* for holding that the Sherman Act does not extend to the present complaint.

III. THE FIRST AMENDMENT RIGHT TO ASSEMBLE AND PETITION.

A. A Construction Of The Sherman Act Should Be Adopted Which Avoids A Serious Constitutional Issue.

In *Noerr* one of the reasons given for construing the Sherman Act to exclude joint appeals to governmental bodies was that a contrary construction would raise the serious question whether First Amendment rights would thereby be infringed. On this subject, the Court said (365 U.S. at 137, 138):

> "Secondly, and of at least equal significance, such a construction of the Sherman Act [to include joint appeals to government] would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above."

Thus the Court was invoking the well-established tenet of statutory construction that Congress is presumed to have chosen to avoid constitutional dangers. *Kent v. Dulles,* 357 U.S. 116 (1958); *Yates v. United States,* 354 U.S. 298 (1957). First Amendment rights occupy a preferred position in our constitutional scheme. See *New York Times Co. v. United States,* 39 U.S.L.W. 4879 (U.S. June 30, 1971).

As in *Noerr* and *Pennington,* extension of the Sherman Act to the facts alleged in the present complaint would raise the First Amendment question in a serious way, regardless of the resolution which might be made if the question were reached. Defendants therefore submit that the tenet of statutory instruction should be applied, and the presence of the constitutional question should be treated as an important reason in addition to those discussed above ("essential dissimilarity", substantial impairment of effective governmental determinations if government is deprived of relevant information, obligation of public trust held by certificated carriers in certificate proceedings) for construing the Sherman Act not to extend to the facts alleged in the present complaint.

B. The Sherman Act Would Violate The First Amendment Right To Assemble And Petition If Construed To Apply To The Facts Alleged.

Even if the reasons described above were held ineffective to limit the Sherman Act in the way urged by defendants, the complaint fails to state a cause of action because application of the Sherman Act to the facts alleged would be unconstitutional.

1. Nature Of First Amendment Rights.

The First Amendment (set out in full in the Attached Appendix, page i) provides that:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

These rights are cognate and inseparable, as this Court stated in *Thomas v. Collins,* 323 U.S. 516, 530 (1945):

"It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . ."

2. The Alleged Activities Are a Form of Political Expression Protected By The First Amendment.

The right to speak and petition extends not only to appeals to the legislature and executive branches of the government but the judicial as well. *NAACP v. Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 39 U.S. L.W. 4428 (U.S. April 5, 1971).

Button involved a Virginia statute making it unlawful (a) to advise a person that his legal rights had been infringed and then to refer him to a particular group of attorneys for assistance, and (b) to render such assistance upon such referral. The statute was struck down as a violation of the First Amendment right to petition and seek redress of grievances. This Court said that litigation under the circumstances was a means of achieving a lawful objective, viz., equal treatment for Negroes, and not a technique for resolving private differences. "In such context," said the Court, "[litigation] is . . . a form of political expression." 371 U.S. at 429.

Similarly in the present case the participation by defendants in the certification process was a means of achieving governmental determinations, based upon pub-

lic interest, that additional certification would run contrary to public convenience and necessity. Such participation was not for the resolution of private differences. There is no such thing as a right to receive a certificate, nor is there such a thing as a right by existing certificate holders to keep others from receiving certificates. The touchstone is always public interest.

Defendants submit that their alleged activities constituted a form of political expression which should be protected by the First Amendment against the application of the Sherman Act just as the litigation in *Button* constituted a form of political expression which was protected by the First Amendment against a restrictive Virginia statute. This conclusion should follow particularly in the area of certificating which contemplates governmental restraints upon trade.

The Ninth Circuit majority seeks to explain away the impact of *Button* by implying that whereas in that case the *NAACP* acted with a lawful purpose in urging utilization of the courts, the defendants here did not act with a lawful purpose in participating before the ICC, the PUC and the courts. (Jt.App. 51, 52, footnote 6.) Such distinction cannot hold up. It is not the defendants' anticompetitive motivation which should be compared with NAACP's objective of equal treatment for Negroes, but rather the defendants' objective of persuading the ICC, the PUC and the courts to draw certain conclusions in the public interest. That was a lawful objective, like the objective to secure equal treatment for Negroes.

This Court has in fact gone far in holding that the protection of the First Amendment applies to petitions

to government. *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 39 U.S. L.W. 4428 (U.S. April 5, 1971). The *Illinois* case held that it was unconstitutional to find as unauthorized practice of the law, an arrangement under which the United Mine Workers employed an attorney on a salaried basis to represent union members wishing such attorney's services to prosecute Workmen's Compensation claims. This Court said (389 U.S. at 223):

> "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button,* but the First Amendment *does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded.* The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.' *Thomas v. Collins,* 323 U.S. at 531, . . ." (Emphasis added.)

3. The Ninth Circuit Majority's Conclusion That First Amendment Protection Must Yield To The Sherman Act Is Not Supported By Authority and Is Not Justified By Reason.

There is no reasonable basis to hold, as the Ninth Circuit majority did upon superficial analysis (Jt.App. 51, footnote 6), that ". . . on balance, the public interest in free competition served by the condemnation of agreements to use judicial and administrative adjudicative processes for the purpose of restraining trade outweighs the resulting restraint upon First Amendment rights".

The Ninth Circuit majority would weigh "free competition" against First Amendment rights. This ignores the fact that the U.S. Congress and California legislature have determined that the preferred social value in the trucking industry is not "free competition" but rather *regulation* by the ICC and PUC. In weighing then, we must add to the First Amendment side of the scale not only the First Amendment rights of the protestants themselves, but also the social value of the administrators receiving truthful information pertinent to the proper discharge of their duties at no investigative cost to the government. It must be presumed that decisions based on this information will be better decisions and hence in the social interest.

On the other side of the scale it is proper to weigh the added cost to applicants of presenting their case, and the possibility that a certain number of them will be deterred, as plaintiffs allege, from making applications. But these are both circumstances which are inherent and must therefore necessarily be accepted in the regulatory scheme adopted by the federal government and by California, under which it is contemplated that the privilege of certification will be conferred only upon proof of the public interest under the broad guide of public convenience and necessity. It is unfortunate that the administrative process should be expensive, and it is unfortunate that some who might be entitled to certification fall back in the face of opposition. Those are circumstances which under our system of government should carry little weight as opposed to the very strong protection of the First Amend-

ment and the compelling need of government to be informed.

We have examined the cases relied upon by the Ninth Circuit majority in which First Amendment rights have been subordinated to a statutory prohibition. All of them except perhaps the 1951 pre-*Noerr* and pre-*Pennington* district court case of *Slick Airways v. American Airlines,* 107 F.Supp. 199 (D. N.J. 1951), *appeal dismissed,* 204 F. 2d 230 (3rd Cir. 1953), present cogent reasons for subordinating the First Amendment. There are no such reasons here.

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) involved an infringement suit on a patent obtained by the perpetration of actual fraud upon government—by supplying information known to be false to the U.S. Patent Office.

United States v. Singer Manufacturing Co., 374 U.S. 174 (1963) involved an agreement under which the conspirators deprived the Patent Office of pertinent information. Thus Mr. Justice White in his concurring opinion stated (374 U.S. at 199, 200):

> "Singer and Gegauf agreed to settle an interference, at least in part, to prevent an open fight over validity. *There is a public interest here . . . which the parties have subordinated to their private ends*—the public interest in granting patent monopolies only when the progress of the useful arts and of science will be furthered because as the consideration for its grant the public is given a novel and useful invention, When there is no novelty and the public

parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted . . . clearly *collusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public* . . . In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade—if not bad per se, then such agreements are at least presumptively bad. . . ." (Emphasis added.)

Kobe v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952) involved purposeful acquisition of a monopoly position by purchase and pooling of patents, as well as extensive direct communications by the patentee to the alleged infringer's customers. The facts in *Lynch v. Magnavox*, 94 F.2d 883 (9th Cir. 1938) were substantially similar.

The *Slick Airways* case (*Slick Airways v. American Airlines*, 107 F.Supp. 199 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3rd Cir. 1953)), arose on motion to dismiss a complaint under the antitrust laws alleging a conspiracy to monopolize and restrain trade utilizing three means: (1) predatory rate policies, (2) abuse of the privilege of intervention in CAB certificate application hearings of plaintiff, and (3) a campaign of unfair competitive practices. The case appears to have been presented to the Court and considered by it chiefly as presenting an issue of primary jurisdiction. This impression is reinforced by the court of appeals decision, 204 F.2d 230 (3rd Cir. 1953). The district judge concluded his dis-

cussion of the alleged abuse of intervention in the certificate hearings as follows:

> "While *it may be questioned* whether any of this alleged activity by defendants *of itself* constituted illegal conduct, . . . this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were *part of the total acts undertaken* to effectuate the alleged conspiracy." 107 F.Supp. at 214. (Emphasis added.)

Thus the case is not a holding, despite the Ninth Circuit majority's reliance upon it, for the proposition that appeals to the CAB, alleged to be abuse of process, are actionable, standing alone, under the Sherman Act. The court indeed indicated that the answer might be in the negative. The court found a way to avoid answering that question by saying that as part of a larger scheme such appeals would be actionable. That was the error. We now know from *Pennington* which was decided some fourteen years later that appeals to governmental bodies are free of Sherman Act proscriptions "either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.[12]

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[12]In seeking to establish the integrity of the *Slick* decision, the Ninth Circuit majority notes that it was cited with approval in *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 707 (1962). However, the point in question was not resolved until *Pennington* in 1965.

4. This Court Has Zealously Guarded First Amendment Freedoms From The Chilling Effect Of Standards Which Cannot Be Clearly Perceived.

In *NAACP v. Button*, 371 U.S. 415 (1963), this Court, per Mr. Justice Brennan, said (317 U.S. at 432, 433):

> ". . . we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. [Citing cases]
>
> * * *
>
> These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Under this test the Sherman Act cannot constitutionally be applied to the facts alleged. The Ninth Circuit majority reads the complaint as alleging abuse of process by making known and carrying out a plan of protesting all certificate proceedings before the ICC, the PUC and the courts. In the context of governmental action directed not to adjudicating private rights but to granting or withholding privilege as determined by public interest, the term "abuse of process" has ambiguous meaning at best. The complaint alleges that defendants participated in certificate proceedings "with or without probable cause, and regardless of the merits." (Jt.App. 7.) Since a certificate holder is vested with public utility obligations and speaks in part for the public, these terms really do not apply. Yet, according to the holding of the

Ninth Circuit majority it would become crucial, in determining Sherman Act liability, to draw a line between "probable cause" and lack thereof, as well as between "merit" and lack thereof, by some test not revealed. The demarcation of such a line is feasible where private rights, such as the absolute monopoly rights granted under patent law, are involved, but not where the issue is whether public interest dictates the conferring or withholding of a privilege.

Defendants submit that the absence of a clear test under the Sherman Act as construed by the Ninth Circuit majority, by which existing certificate holders can determine how far they can go without violating that Act, produces a chilling effect upon First Amendment freedoms and thereby makes the Act unconstitutional if construed to apply.

It is plain to see why such a large number of trade associations across the country have expressed their concern over the holding of the Ninth Circuit majority. If the decision is allowed to stand such associations will be acting at their peril each time they participate through joint action of their members in making their views known to administrative agencies and courts concerned with restrictive actions based upon public interest. This is a result which we believe this Court will not countenance.

IV. THE FACTS ALLEGED IN THE COMPLAINT DO NOT FALL WITHIN THE "SHAM" EXCEPTION OF NOERR: DEFENDANTS GENUINELY INTENDED TO INFLUENCE THE ICC, THE PUC AND THE COURTS.

The "sham" exception is a dictum in *Noerr* which has a clear meaning in its context. The words, per Mr. Justice Black, are (365 U.S. at 144):

> "There may be situations in which a *publicity campaign,* ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denied that the railroads were making *a genuine effort to influence legislation and law enforcement practices.*" (Emphasis added.)

The publicity campaign in question was the campaign used by the railroads to influence the legislature, the governor, and law enforcing officers. Rather than appeal to these governmental bodies directly the railroads had hired a public relations firm which approached members of the public, who in turn made representations to the governmental officials. This led to the possibility that perhaps the railroads were not actually trying to influence the governmental bodies to take action hurtful to the truckers but rather were trying to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly. 365 U.S. at 142. In that case the indirect approaches to the governmental bodies would be "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor".

The Court in *Noerr* then proceeded to make doubly clear what it meant by "sham". It said that there was no sham because (365 U.S. at 144):

> "No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices".

This conclusion was fortified by the fact that the effort, in addition to being genuine, was "also highly successful". 365 U.S. at 144.

It follows that if the facts involve a genuine attempt to influence governmental officers—genuine in the sense that there is a genuine effort to persuade such officers to take certain action—there is no sham, regardless of intent. The facts of *Noerr* revealed a sole purpose to destroy the truckers by influencing governmental action. It *also* included an intent to do more than merely seek to influence governmental action, viz., an intent (365 U.S. 142):

> "... '*to hurt the truckers in every way possible even though they secured no legislation*'. (Emphasis in original.) Specifically the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly . . . and that the railroads were successful in these efforts to the extent that such injury was actually inflicted".

This was not enough to render the *Noerr* principle inapplicable *because* there were no findings that the railroads "attempted directly to persuade anyone not to deal with the truckers". 365 U.S. at 142. The Court said such findings (365 U.S. at 143, 144):

> ". . . can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen. . . It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of the campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. *To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.*"

In effect the Court said, given a genuine intent to influence governmental action—genuine in the sense that a genuine effort is made to persuade governmental officials to take certain action—it becomes immaterial what other intents or purposes may be present. The rationale is that to hold otherwise would deprive government of valuable information and, conversely, impair the First Amendment right to petition. In other words, the reasons for finding a Sherman Act exemption are equally compelling whether there is the single intent genuinely to influence governmental action or whether such intent is coupled with another, even primary, intent to destroy or injure.

The instant case presents a close parallel, but its facts are even stronger for the proposition that there was no "sham" as the Court in *Noerr* used that term. No dealing through intermediaries is involved. The only acts complained of are the defendants' direct approaches to the

governmental bodies. There is no allegation of any other conduct such as an attempt directly to persuade people not to deal with the plaintiff truckers. That the defendants made a genuine effort to persuade the ICC, the PUC and the reviewing courts to take certain action is spelled out in the complaint and is recognized by the Ninth Circuit majority. (Jt.App. 59.)

Given these facts there can be no "sham" as *Noerr* used that word. Whatever other intent or motive may have accompanied such acts, that other intent or motive does not affect the *Noerr-Pennington* immunity. As the Court, per Mr. Justice White, said in *Pennington* (381 U.S. at 670):

> "Noerr shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose.*" (Emphasis added.)

The Ninth Circuit majority was unwilling to accept the limitations of the sham exception and created a broader sham exception of its own. In disregard of the proposition that other purposes or intents are immaterial, once it is established that the efforts to influence governmental action are genuine and intended to be as effective as possible, the Ninth Circuit majority indulged in a consideration of primary and secondary intent. It concluded (although there is no express wording in the complaint upon which such conclusion can be rested) that the alleged "primary purpose" was to inflict injury "directly" by deterring plaintiffs from seeking certificate authority, and that inevitably "indirect" injury was accomplished "by influencing rulings of the agencies and the courts". (Jt.App. 59.)

Defendants submit that such reasoning is fallacious. It injects intent as a significant factor despite this Court's clear statement that other intents are irrelevant once an intent genuinely to attempt to influence governmental action is established. It disregards the reasons for the *Noerr* exemption which are just as compelling when there are several intents as well as when there is only the single intent genuinely to influence governmental action. Moreover, the holding of the Ninth Circuit requires an unrealistic and esoteric speculation into degrees of intent. Even those directly involved in genuine efforts to influence governmental action would have difficulty sorting out in their own minds whether their "primary" intent was to influence the governmental officials or to restrain competition. Certainly the latter intent is always present whenever competitors seek to influence governmental bodies to take restrictive action. Since the *Noerr* exemption would hinge on the result of that speculation, a chilling effect upon the exercise of First Amendment rights would be produced in a way similar to the chilling effect described earlier which would arise from attempting to apply the Sherman Act according to a vague standard of "probable cause" or "merit" in proceedings involving not private rights but public interest.

In short the Ninth Circuit majority's sham exception would undermine the very reasons assigned by the Court in *Noerr* for finding the Sherman Act not applicable to joint appeals to governmental officials.

V. THE EXTENSIVE REGULATORY SUPERVISION OF THE PUC AND ICC MAKES APPLICATION OF THE SHERMAN ACT UNNECESSARY. THE RULE OF REASON.

The literal words of the Sherman Act condemning every restraint of trade have been tempered by the rule of reason expressed long ago in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). In that case the Court said (221 U.S. at 60):

> "... [the statute] is broad enough to embrace every conceivable contract or combination ... anywhere in the whole field of human activity. . . the standard of reason which had been applied at the common law in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

The rule of reason demands that recognition be given to the appropriate functions of administrative agencies and the courts, as well as to the appropriate areas for exercise of federal and state authority. In *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945) this Court expressed it this way:

> "[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. 'The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not likely to be imputed to Congress.' Apex Hosiery Co. v. Leader, 310 U.S. 469, 513."

In the present case the Sherman Act is an inappropriate and unnecessary vehicle to correct whatever abuses there may be flowing from defendants' protests to the grant or transfer of certificates. As dissenting Circuit Judge Hamlin said below (Jt.App. 60):

> "The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates, see California Public Utilities Code §§1062, 1064, and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy".

A similar conclusion applies to the ICC. Each of these bodies is vested with all the authority necessary to deal with any alleged abuse of the administrative process. See Attached Appendix, pp. iii-xxvii.

In a vein similar to that of Circuit Judge Hamlin, the opinion of Judge Sweigert of the District Court below states (Jt.App. 37):

> "As impliedly recognized in Noerr, the 'probable cause' or 'merit' of such applications or oppositions as are presented to the regulatory agency (or to the legislative or other executive officials) can be left to their responsible expertise (and appropriate judicial review) rather than be presented to the courts *in the guise of an antitrust suit.*" (Emphasis added.)

On this subject a penetrating analysis was made by Mr. Costilo of the Antitrust Division of the Department of Justice in his article, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 Mich. L. Rev. 333 (1967).[13] He remarked at pages 343, 344:

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[13]The article is accompanied by a footnote (66 Mich. L. Rev. 333) stating that the views are personal to the author.

"The closer the agency supervision of the anti-competitive conduct in question, the greater the justification for removing the protections of the antitrust laws, because of the added assurance that the conduct is subject to the careful review of some public body—even if it is not a court. Thus in *United States v. Socony Vacuum Oil Co.* [310 U.S. 150 (1940) at 227 n 60], it was stated that 'the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives'.

* * *

"In addition to the closeness of regulation, courts have also been influenced by whether the governmental apparatus provided procedural safeguards to prevent groups of competitors from taking advantage of smaller, non-allied competitors having adverse commercial interests. Although these considerations have become somewhat obscured by *Noerr*, an analysis of *Pennington* and the main cases cited in support of the broad language in the *Noerr* opinion indicates they are very much with us—although not always articulated." (Footnotes omitted.)

After referring to the rather comprehensive machinery in *Pennington* as well as in *United States v. Rock Royal Co-operative, Inc.* (307 U.S. 533 (1939)) and *Parker v. Brown*, 317 U.S. 341 (1943)), the author concluded, at 346:

"It is not suggested that this rationale will apply to all *Noerr-Pennington* type issues. But in those cases where the pertinent statutory provisions are ambiguous it is useful to determine whether the government merely adds its rubber stamp to the private anti-competitive scheme, or whether there is a more searching independant inquiry".

In the present case there can be little doubt that the machinery for adequate regulatory control, both at the procedural and substantive level, is present. Indeed, the comprehensiveness of regulation vested in the ICC and PUC, both as to procedure and substance, in certificate matters is perhaps as great as one can find anywhere in the country. A scanning of the statutory and procedural material appended to this brief (Attached Appendix, pages iii-xxvii) gives an indication of the sweep of this control.

The assurance that any ultimate restriction in restraint of trade will be at the behest of government acting with independence of judgment, and not at the behest of competitors acting through government, is of course an important element in applying the *Noerr-Pennington* exemption. The Court in *Noerr* started its discussion by saying (365 U.S. at 136):

> "... it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."

The authorities cited in support of this holding were *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939) and *Parker v. Brown*, 317 U.S. 341 (1943).

One of the most recent instances of such Sherman Act immunity is found in *Washington Gas Light Company v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971). It was there held, upon authority of *Parker v. Brown*, that the filing of rates by an electric utility with a commission which had full regulatory control over such rates protected the electric company against Sherman Act violation even though the purpose of such rate-filing

was anti-competitive. The fact that the commission had not affirmatively approved such rates was held not to change the result. The Court said (438 F.2d at 252):

> "The antitrust laws are a poor substitute, we think, for plaintiff's failure to promptly protest to the SCC [state commission having regulatory jurisdiction over utility rates] and to seek the administrative remedy ultimately shown to have been available and effective. We think VEPCO's [Virginia Electric Power Company's] promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these practices exempt from the application of the laws of antitrust under the *Parker* doctrine".

In the present case there is no allegation that the PUC or the ICC or the courts have at any time lacked, or been prevented from exercising, full control over the extent to which they would allow defendants to protest and participate. There is no allegation that the PUC or the ICC or the courts have at any time been prevented from exercising full control over their determinations on the merits. Thus, such condemning characterizations in the complaint as that defendants have "become the regulators . . . . rather than the PUC, the ICC and the courts" (Jt.App. 11) lack factual foundation. Indeed, it was not questioned either by the Court of Appeals or by the District Court below that, under the allegations of the complaint, the governmental bodies had full control over their procedures and their determinations at all times.

Perhaps it was because of a desire to give the plaintiffs every opportunity to make out a cause of action by pleading, if they truthfully could, a subjugation of the

governmental bodies, that Judge Sweigert commented (Jt. App. 43):

> "The pleading has already been once amended and, presumably, plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation".

Notwithstanding, he gave plaintiffs another fifteen days within which to amend, an opportunity of which they did not avail themselves.

Because of the very broad regulatory control lodged in the ICC and PUC, the situation presented in the present complaint is quite different from that in patent antitrust cases. There is no agency of government which performs, as to patents, a function comparable to that performed by the PUC and ICC. No agency has the power and the mandate to determine that the public interest would be served by certifying additional entities to exploit a given patent. Unlike an operating certificate holder, a patent holder is given an absolute monopoly. The tension between the patent holder's right and the objectives of the antitrust laws is thus starkly presented. No government watchdog stands ready to guard against the many abuses which a patent holder may be tempted to engage in with a view to expanding his economic power beyond its legally limited confines. Through application of the antitrust laws a policing of abuses of patents by the courts can be accomplished. No such necessity exists here, since the ICC and PUC stand ready and able to perform the task.

VI. SUMMARY OF SELECTED LOWER COURT AUTHORITIES.

We present here for the Court's consideration a summary of some of the many lower court opinions applying the *Noerr-Pennington* doctrine. No case prior to the present one has held or indicated the view that *Noerr-Pennington* is limited in the manner held by the Ninth Circuit majority. Indeed, one case, *Bracken's Shopping Center v. Ruwe*, 273 F.Supp. 606 (S.D. Ill. 1967) has specifically held that the doctrine applies to concerted appeals to the judiciary. Another, *Association of Western Railroads v. Riss*, 299 F.2d 133 (C.A. D.C. 1962) held that *Noerr-Pennington* shields appeals to the I.C.C. with respect to its function of certificating interstate truckers.

As to those cases finding that the *Noerr-Pennington* immunity does not apply, it will be seen that they, too, lend support to the defendants' position that the doctrine, properly conceived, protects the alleged conduct in the instant case.

A. Cases Applying the Noerr-Pennington Immunity.

(1) *Bracken's Shopping Center v. Ruwe*, 273 F.Supp. 606 (S.D. Ill. 1967): defendants conspired to file in the state court a representative suit challenging the validity of a statute under which the city had vacated certain streets. In granting a motion to dismiss the court said (page 607):

> "Since the complaint alleges no other act or conspiracy, the court grants the defendants' motions to dismiss because it does not believe that *resort to the judiciary*, even in concert or in an effort to restrict competition, can violate the antitrust laws of the United States". (Emphasis added.)

The court went on to refer to *Noerr* and *Pennington* and stated that those cases stand for the general proposition that "seeking lawful legislative, executive, or judicial action does not violate the antitrust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition."

(2) *Association of Western Railroads v. Riss,* 299 F.2d 133 (C.A. D.C. 1962); case below is reported at 170 F. Supp. 354 (D.C. D.C. 1959): combination of 58 railroads, several railroad trade associations, and a public relations firm, to carry on a program of soliciting, directly and indirectly, various state officials to take steps leading to the revocation and cancellation of interstate motor carrier operating rights held by plaintiff. A public relations expert was hired to persuade the Public Utilities Commission of Ohio to file proceedings before the ICC looking toward cancellation of plaintiff's operating authority. There also was solicitation of state and city officials to enact laws, ordinances and regulations designed to hamper and to render economically infeasible the operations of plaintiff. Also state officials were urged to carry out a campaign of unusually strict enforcement of statutes, ordinances and regulations aimed at plaintiff's vehicles, even to the point of urging the Public Utilities Commission of Ohio to assign special investigators to follow the plaintiff's trucks.

The combination was also alleged to have abused its privilege of intervention in proceedings before the ICC by carrying on an extensive campaign of anti-truck propaganda in order to persuade citizens' groups and others to register their complaints against plaintiff in the course of

proceedings started by plaintiff before the ICC to obtain new operating authorities.

Relying on *Noerr* the Court of Appeals for the District of Columbia held all these acts beyond the reach of the Sherman Act.

(3) *Baltimore & O. Ry. Co. v. N.Y., N.H. & H. Railway*, 196 F.Supp. 724 (S.D. N.Y. 1961): the action challenged under the antitrust laws consisted of (a) propagandizing the Interstate Commerce Commission for the proposition that an increase in the per diem car rate would increase car supply and eliminate car shortages, (b) propagandizing the Senate Committee on Interstate and Foreign Commerce to like effect, (c) utilizing the process of the Interstate Commerce Commission to make increased per diem charges binding upon the complainants, and (d) utilizing the process of the federal court to force payment of certain per diem charges. The court, in reliance upon *Noerr*, dismissed these contentions with the following language (196 F.Supp. at 748):

> "Finally, neither the filing of suit nor the propagandizing of the Commission in furtherance of plaintiffs' joint effort to impose these rates is in violation of the Sherman Act. [citing *Noerr*] Whether plaintiffs have been withholding tariffs in an attempt to enforce the rate is a question which can be raised and determined in the Commission proceedings and with which the Commission is particularly concerned and better able to dispose of."

(4) *Schenley Industries, Inc. v. New Jersey Wine and Spirit Wholesalers Association*, 272 F.Supp. 872 (D. N.J. 1967): the allegation was that a wholesale liquor dealers' association attempted to use improper influence upon the

State Division of Alcoholic Beverage Control in order to obtain favorable decisions. The court in concluding that the portions of the complaint which alleged such activities should be stricken said (272 F.Supp. at 884):

> "In addition, however, Schenley continues to suggest that the lobbying itself, if sufficiently illegal apart from its antitrust aspect, is not shielded from liability under the Sherman Act. Schenley argues that Noerr and Pennington protect lobbying merely misleading or unethical, but do not extend to acts flagrantly violative of state law.
>
> * * *
>
> "Noerr and Pennington make clear that concerted private effort to influence government action does not violate the Sherman Act, no matter how self-interested, devious, or anti-competitive".

(5) *A.B.T. Sightseeing Tours Inc. v. Gray Line N.Y. Tours,* 242 F.Supp. 365 (S.D. N.Y. 1965): combination to persuade legislative bodies and administrative agencies of the City of New York to enact and promulgate laws and regulations which would suppress and eliminate competition between defendants and plaintiffs. A motion to strike this part of the complaint was granted, citing *Noerr.*

(6) *U.S. v. Johns-Manville Corporation,* 259 F.Supp. 440 (E.D. Penn. 1966): informal approach to municipal authorities to persuade them to impose restrictive specifications on pipe which the municipal authorities would accept. Such activity was held not subject to the antitrust laws, by reason of *Noerr* and *Pennington.*

(7) *Harman v. Valley National Bank of Arizona,* 339 F.2d 564 (9th Cir. 1964): combination to inform the Attorney General of Arizona (alleged to have been a participant

in the combination) of alleged irregularities and to persuade him to file a suit against a savings and loan association for irregularities under the state statute. The suit resulted in placing the savings and loan association in receivership and closing its business. This hurt the plaintiff because it was unable to get the receiver to approve a contractual claim against the savings and loan association. The plaintiff brought an antitrust action. The Ninth Circuit agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit. The court reasoned that:

> ". . . to make Sherman Act liability depend upon ultimate resolution of often difficult questions of law and fact relating to the validity or propriety of solicited governmental action 'would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade' (365 U.S. at 137, 81 S.Ct. at 529), and 'would raise important constitutional questions' because of the inevitable burden which such a construction of the Sherman Act would impose upon the right of the people to petition the government for the redress of grievances. 365 U.S. at 138, 81 S.Ct. at 530." 339 F.2d 564 at 566.

Nevertheless, the court reversed the grant of dismissal noting that clarification of the complaint was necessary, and that two possibilities for relief were open. First, the complaint could be read as alleging the joint effort to influence the Attorney General was but one part of a larger scheme to restrain and monopolize commercial banking. (This, of course, was a pre-*Pennington* case. The possible implication of the court that the existence of a "larger scheme" could taint otherwise *Noerr* protected

conduct would be erroneous under *Pennington*.) Secondly, respecting the allegation that the Attorney General was a co-conspirator, the court noted that neither *Parker* nor *Noerr* compelled the conclusion that such a case would be immune.

(8) *Central Savings and Loan Association of Chariton, Iowa v. Federal Home Loan Bank Board*, 422 F.2d 504 (8th Cir. 1970): Complaint by group of banks and savings and loan institutions alleging that defendant bank violated Sherman Act §§ 1 and 2 by applying to the Federal Home Loan Bank Board for authority to operate mobile lending facilities in a number of surrounding smaller communities where plaintiffs were located and applying to the same agency for permission to merge with another bank in the area. The lower court awarded summary judgment to defendant bank (293 F.Supp. 617 (S.D. Iowa, 1968)). In affirming, the 8th Circuit Court of Appeals observed (422 F.2d at 504):

> "Generally, however, solicitation of governmental action in accordance with a valid regulatory scheme for the sake of obtaining an economic or competitive advantage is not prohibited by the antitrust laws. [Citing *Noerr* and *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533.]"

B. Cases Holding Noerr-Pennington Inapplicable.

1. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir., 1970), *cert, denied*, 400 U.S. 850 (1970): Complaint under Sherman Act §§ 1 and 2 against the designer and manufacturer of swimming pool gutters (Paddock) and its dealers by a competitor. The district court granted Paddock's motion for summary judg-

ment on the authority of *Noerr-Pennington*. The market for gutterless swimming pools is one which, due to the expense of construction of such pools, is limited almost entirely to public bodies or private bodies using public funds and hence subject to state and local government-imposed public bidding procedures. A public body desiring to install a pool typically hires an architect to draft specifications for use in the public bidding. Paddock sought to foreclose competition in this market by submitting to the architect drafts of specifications purporting to be neutral technical descriptions, but in fact, describing only Paddock's product in a variety of ways, and then endeavoring to persuade the architect, through personal visits to adopts its specifications. Paddock conceded for purposes of the motion "that it had combined with dealers and others to effect the use of its specifications in the public swimming pool industry, that its specifications were so drawn that only it could comply, and that its purpose was to eliminate competition" (424 F.2d at 27).

The Court of Appeals for the First Circuit reversed, rejecting *Parker v. Brown* and *Noerr-Pennington* as giving antitrust immunity.

As to *Parker v. Brown*, the court observed that, in adopting the specifications, the public bodies (by reason of Paddock's failure to disclose, it may be noted) never even considered the monopolistic practices hidden within the specifications, and hence, this adoption did not constitute a publicly imposed restraint within the meaning of *Parker v. Brown*. Moreover, the court noted that the government's imposition of the competitive bidding, which Paddock's conduct subverted, signified "its intent to respond to the

signals of a competitive market on the same terms as any other consumer, an intent which is entirely consistent with the aims of the Sherman Act." 424 F.2d at 31.

The court also alluded with apparent approval to the *district court opinion* in the instant case in the following passage:

> "Our reading of *Parker* convinces us that valid governmental action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.
>
> "In terms of such deliberate governmental occupation of a field normally left to the free winds of competition, this case falls at the opposite end of the spectrum from *Parker*. At the *Parker* end of the spectrum lie cases like *Trucking Unlimited v. California Motor Transport Co.*, 1967 Trade Cas., ¶72,298 (N.D.Cal. 1967), a case involving certification of common carriers where the deliberate choice of a regulatory agency intervened between the private anti-competitive activity and the resulting restraint on trade." 424 F.2d 25 at 30.

The Court then turned to *Noerr-Pennington:*

> "The key to this decision [*Noerr*], in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the 'passage or enforcement of laws.' The entire thrust of *Noerr* is aimed at *insuring uninhibited access to government policy makers.* A pluralistic society moves by many motives. The hope, supported by history, is that *permitting every interest to be heard* will produce a tolerable amalgam responsive to the needs of a given time. . . . By 'en-

> forcement of laws' we understand *some significant policy determination in the application of a statute* . . ." (Emphasis supplied.) 424 F.2d at 32.

Noerr, so interpreted, would obviously not protect Paddock's "communications" to government officials charged only with making "a technical decision about the best kind of weld to use in a swimming pool gutter." *Id.*

Further, the manner of the communication and its content rendered it unworthy of protection:

> "[T]he efforts of an industry leader to impose his product specifications by *guile*, *falsity*, and *threats* on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws." (Emphasis supplied.) *Id.*

2. *Woods Exploration & Producing Company, Inc. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971) *petition for cert. filed*, 39 U.S.L.W. 3528 (U.S. May 15, 1971) (No. 1712): As here pertinent, this complicated litigation concerned the applicability of *Parker v. Brown* and *Noerr-Pennington* to defendants' filing of false nomination forecasts with the Texas Railroad Commission. The Commission relied upon the forecasts to determine the respective production quotas with respect to an oil field where plaintiffs and defendants were producers. The false forecasts caused the Commission to reduce plaintiff's production allowables. The district court awarded summary judgment to plaintiffs as to this part of the claim. In affirming, the Fifth Circuit reasoned, first, that there was no state action within the meaning of *Parker v. Brown* because the Commission had to rely upon the truthfulness of the producers

and did not intend its order to be based on false facts: "The Texas regulatory scheme at issue in this case does not sanction defendants' alleged conduct." 438 F.2d at 1296.

Similarly as to *Noerr-Pennington,* the court reasoned that there is *no policy determination* entrusted to the Commission in making production allocations, and hence, its function is "apolitical" and not protected by *Noerr.*

The court quoted with approval the view of *Noerr-Pennington* taken in the *Whitten* case, that *Noerr* is concerned with protecting access to officials charged with significant policy making functions.

The Fifth Circuit also relied, in part, on the Ninth Circuit majority's decision in the instant case. However, the court indicated its doubt as to the correctness of the Ninth Circuit's conclusion in these words (438 F.2d at 1297):

> "Characterizing the licensing procedure as adjudicative, the Court [Ninth Circuit] *felt* that the defendants were not seeking to influence a policy-making function; rather they were attempting to undermine a well defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies." (Emphasis added.)

3. *Sacramento Coca-Cola Bottling Co., Inc. v. Chauffeurs Local 150,* 440 F.2d 1096 (9th Cir. 1971): Plaintiffs alleged that defendants employed threats, duress and other coercive measures to cause State Fair officials to issue a directive forbidding the sale of their product (Coca-Cola) on State Fair grounds. Plaintiff sought recovery, *inter alia,* under the Sherman Act. The lower court

granted defendant's motion for judgment on the pleadings on the basis of *Noerr-Pennington*. The Ninth Circuit reversed reasoning that threats and intimidation were not the kind of communication which *Noerr-Pennington* protects.

CONCLUSION

For all of the reasons set forth herein defendants submit that the complaint fails to state a claim upon which relief can be granted. Therefore the decision of the Court of Appeals should be reversed and the complaint dismissed.

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Dated, August 23, 1971.

(Appendix Follows)

Appendix

RELEVANT PROVISIONS FROM THE U.S. CONSTITUTION, FEDERAL AND STATE STATUTES, AND RULES OF THE INTERSTATE COMMERCE COMMISSION AND CALIFORNIA PUBLIC UTILITIES COMMISSION.

I. U.S. Constitution

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

II. Sherman Antitrust Act

15 U.S.C. § 1:

Trusts, etc., in restraint of trade illegal.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

15 U.S.C. § 2:

Monopolizing trade a misdemeanor.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

15 U.S.C. § 4:

Jurisdiction of courts.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; . . ."

III. Clayton Antitrust Act

15 U.S.C. § 15:

Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 25:

Restraining violations.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, ..."

15 U.S.C. § 26:

Injunctive relief for private parties; exception.

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief

against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

IV. Interstate Commerce Act

49 U.S.C. § 304:

General Duties and Powers of the Commission.

"(a) It shall be the duty of the Commission—

(1) *To regulate common carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to *continuous and adequate service,* transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. (Emphasis added.)

* * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; . . .

(7) For purposes of the administration of the provisions of this part, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and *may obtain from such carriers and persons such information as the Commission deems necessary* to carry out the provisions of this part; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. . . ." (Emphasis added.)

49 U.S.C. § 305:

Administration. Joint Board. Participation in Hearing. Notice and Opportunity for Intervention.

"(a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: *Applications for certificates,* permits, or licenses; the *suspension, change, or revocation of such certificates,* permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control

or operating contracts; . . . The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing and the recommendation of an appropriate order thereon: *Provided, however,* That a joint board may, in its discretion, report to the Commission its conclusions upon the evidence received, if any, without a recommended order. Orders recommended by joint boards shall be filed with the Commission, and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure, as provided in the case of orders recommended by members or examiners under section 17. If a joint board to which any matter has been referred shall report its conclusions upon the evidence without a recommended order, such matter shall thereupon be decided by the Commission, giving such weight to such conclusions as in its judgment the evidence may justify.

* * *

(d) So far as may be necessary for the purposes of this part, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts,

agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under part I; and any person subpenaed or testifying in connection with any matter under investigation under this part shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under part I, unless otherwise provided in this part.

(e) In accordance with rules prescribed by the Commission, *reasonable notice shall be afforded,* in connection with any proceeding under this part, *to interested parties* and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, *and opportunity for intervention* in any such proceeding *for the purpose of making representations to the Commission or for participating in a hearing,* if a hearing is held, *shall be afforded to all interested parties.* (Emphasis added.)

(f) The Commission is authorized to confer with or to hold joint hearings with any authorities of any State in connection with any matter arising in any proceedings under this part. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities as fully as may be practicable, in the enforcement or administration of any provision of this part. . . ."

49 U.S.C. § 306:

Application for Certificate of Public Convenience and Necessity.

"(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common

carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . .

* * *

(6) On and after October 15, 1962 no certificate of public convenience and necessity under this chapter shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control with any carrier engaged in operations outside such State, if such carrier has obtained from the commission of such State authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that *reasonable opportunity was afforded interested persons to be heard,* that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted.

Such operations in interstate and foreign commerce shall, however, be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. . . ." (Emphasis added.)

49 U.S.C. § 307:

Issuance of Certificate.

"(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . .

(b) . . . ."

49 U.S.C. § 308:

Terms and Conditions of Certificate.

(a) Any certificate issued under section 306 and 307 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, *at the time of issuance and from time to time thereafter,* be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public

convenience and necessity *may from time to time* require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 304 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) . . . ." (Emphasis added.)

49 U.S.C. § 312:

Suspension, Change, Revocation and Transfer of Certificates, Permits, and Licenses.

"(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such *certificate,* permit, or license *may, upon application* of the holder thereof, *in the discretion* of the Commission, *be amended or revoked,* in whole or in part, or may *upon complaint, or on the Commission's own initiative,* after notice and hearing, *be suspended, changed, or revoked,* in whole or in part, for wilful failure to comply with any provision of this part, or with any lawful order, rule, or regulation promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than

thirty days, to be fixed by the Commission, with a lawful order made as provided in section 304(c), commanding obedience to the provision of this part, or to the rule or regulation thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license or any application filed pursuant to the provisions of section 306, 309, or 311, or by virtue of the second proviso of section 306 (a) or temporary authority under section 310a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 311 (c), 317 (a), or 318 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder." (Emphasis added.)

"(b) Except as provided in section 5 [relating to combinations and consolidations of carriers] any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

V. Interstate Commerce Commission's General Rules of Practice

Rule 39 (49 C.F.R. § 1100.39):

Applications; notice.

"Appropriate notice of the filing of an application will be given by the applicant or by the Commission to the States, to State authorities, or to other persons as may be required by the form or instruction or by the act."

Rule 40 (49 C.F.R. § 1100.40):

Protests against applications.

"(a) *Content.* A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a concise statement of the interest of protestant in the proceeding.

(b) *When filed.* Any protest shall be filed with the Commission promptly after the application is filed. If the proceeding be one respecting which the Commission has issued a notice advising the public of the filing of the application, the protest shall be filed within the time specified in such notice. Failure to file a protest shall not prejudice subsequent participation in the proceeding.

(c) *Copies; service.* A protest filed under this section shall be served upon applicant and, unless otherwise specified in the public notice, the original and six copies of the protest shall be filed with the Commission.

(d) *When rule disregarded.* An application may be set for hearing *without awaiting the filing of a protest or of a reply thereto,* and also may be disposed of without regard to the prior paragraphs of this section unless the act provides that the particular application may be granted only upon hearing." (Emphasis added.)

Rule 74 (49 C.F.R. § 1100.74):

Witness examination; order of procedure.

"Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Commission in the manner provided under modified or shortened procedure. In formal complaint, application, and

investigation proceedings complainant, applicant and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close; and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent. Intervenors shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

Rule 76 (49 C.F.R. § 1100.76):

Evidence; cumulative restriction.

"It shall be the duty of the officer before whom any proceeding is being heard *to limit the number of witnesses whose testimony may be merely cumulative*: And in order to enforce this section, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness proffered." (Emphasis added.)

Rule 96 (49 C.F.R. § 1100.96):

Exceptions to officer's report.

"(a) *Generally.* Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. When exception is taken to a statement of fact contained in the report, reference also must be made to the page

or part of the record relied upon to support the exception and a corrected statement must be incorporated.

(b) *When filed.* Within 30 days after service of the officer's report, any party may file and serve exceptions thereto and reasons in support thereof. Replies may be served and filed as provided in Rule 23. In any case the Commission may, in its discretion, upon notice to the parties reduce or extend the time for filing exceptions or replies.

(c) *Exceptions and request for hearing by person not party.* If the proceeding is one in which no oral hearing has been held, any person not a party to the proceeding, but having an interest therein, may file and serve upon applicant, or complainant, as the case may be, exceptions to the officer's report and reasons in support thereof. A request for hearing may be included therein but the exceptions need not include a request for hearing if none is deemed necessary."

Rule 101 (49 C.F.R. § 1100.101):

Petitions for rehearing, reargument, or reconsideration.

"(a) *In general.* (1) A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(2) *Administrative finality of division and employee board decisions.* All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final,

except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division; *Provided, however,* That this subparagraph shall not preclude the seasonable filing of a petition for relief under paragraphs (b) and (c) of this section, to be considered and disposed of by the division or appellate division which made the decision, order, or requirement as to which relief is sought. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceedings shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(4) *Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted.* In any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsideration within the meaning of section 17 of the act and shall not exceed 3 pages. No reply thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(5) *Copies of petitions and replies.* In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance. In all other cases, the original and 7 copies of such petitions and replies shall be furnished for the use of the Commission.

(b) *Rehearing or further hearing.* When in a petition filed under this section opportunity is sought

to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) *Modification of effective date.* A petition under this section seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) *Reconsideration.* If relief under this section other than under paragraphs (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in Rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order, except as otherwise provided in the special rules of practice.

(f) *Successive petitions on same grounds, not entertained.* A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When

an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original, or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition."

Rule 247 (49 C.F.R. § 1100.247):

Special Rules for Applications for Certificates of Public Convenience and Necessity.

"(d) *Protests and request for hearing.* (1) Protests to the granting of an application shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. A protest filed under these rules shall certify that it has been served upon applicant's representative (or applicant, if no practitioner representing him is named in the notice of filing published in the FEDERAL REGISTER). Unless otherwise specified in the published notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against any application shall set forth specifically the grounds upon which it is made and contain *a detailed statement of the protestant's interest in the proceeding (including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application, and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed),* shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. Protests phrased in general terms and not complying with these specifications may be rejected. (Emphasis added.)

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the number of witnesses which would be presented by the protestant and an estimate of the hearing time required for such presentation. Protests embracing a request for oral hearing shall contain the following certification without further qualification:

> The undersigned hereby certifies that, if an oral hearing is held, protestant(s) will appear and present evidence of protestant(s) own operations and particular interest(s) in the outcome of this application unless this application is amended so as to eliminate the interest(s) of protestant(s) as set forth in this protest.

(5) Where a person has a *limited interest* in an application, *which possibly could be eliminated by a restrictive amendment to the application;* which

amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph *an offer to withdraw the protest* in the event of acceptance by applicant and the Commission of such amendment." (Emphasis added.)

VI. Administrative Procedure Act (as codified prior to 1966 amendments)

5 U.S.C. § 1008:

Hearings.

". . . .

"(b) Hearing powers—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act. . . ."

VII. California Public Utilities Code

§ 701:

General Authority.

"The commission may supervise and regulate every public utility [including highway common carriers] in the State and may do all things, whether specifically designated in this part or in addition thereto,

which are necessary and convenient in the exercise of such power and jurisdiction."

§ 1061:

Highway Common Carriers.

"No highway common carrier . . . shall operate or cause to be operated any auto truck . . . for the transportation of property as a common carrier for compensation on any public highway in this State except in accordance with the provisions of this part [the Public Utilities Act]."

§ 1062:

Commission Regulation of Common Carriers.

"The commission may: (a) supervise and regulate every highway common carrier . . . in this State; (b) fix the rates . . . and rules of each such carrier; (c) regulate the accounts and service of each such carrier . . . ; (d) supervise and regulate such carriers in all other matters affecting the relationship between them and the shipping public. The commission, by general order or otherwise, may prescribe rules applicable to any and all highway common carriers. . . ."

§ 1063:

Certificate of convenience and necessity; transfer of franchise.

"No highway common carrier, . . . shall begin to operate any autotruck, or other self-propelled vehicle, for the transportation of property for compensation on any public highway in this state without first having obtained from the commission a certificate declaring that public convenience and necessity re-

quire such operation. . . . Any right, privilege, franchise, or permit held, owned or obtained by any highway common carrier . . . may be sold, leased, transferred, or inherited as other property, only upon authorization by the commission."

§ 1064:

Issuance of Certificate.

". . . the commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. . . ."

§ 1069:

Application for Certificate.

"An applicant shall submit his written verified application to the commission. The application shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission requires."

§ 1070:

Suspension, Revocation, Suspension of Certificate.

"The commission may at any time for a good cause suspend, and upon notice to the . . . grantee of any certificate, and opportunity to be heard, revoke, alter, or amend any such operative right or certificate. . . ."

§ 1071:

Hearings; Rules of Practice and Procedure.

"All hearings, investigations, and proceedings shall be governed by this part [Public Utilities Act] and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

§ 1731:

Rehearing.

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 10th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 10th day after the date of issuance."

§ 1756:

Judicial Review.

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."

§ 1757:

Scope of Judicial Review.

"No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

§ 1758:

Appearances Allowed in Review Proceeding.

"The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article."

VIII. California Public Utilities Commission's Rules of Practice and Procedure

Rule 21:

Common Carrier Certificates.

". . . [A]pplications for certificates . . . shall contain the following data . . . :

(f) *The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named.* Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission. . . ." (Emphasis added.)

Rule 37:

Additional Requirements for Applications to Transfer Common Carrier Certificates.

". . . the application shall show the following data:

(a) The territory or points served, the nature of the service, the effect of the transaction upon present operations or rights of the applicant carrier, *the names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. . . .*" (Emphasis added.)

Rule 52:

Publication of Notice of Hearing.

"In . . . [certificate applications], applicant shall provide such notice to the public as the assigned Commissioner or Examiner may designate for such proceeding. . . ."

Rule 54:

Participation Without Intervention.

"In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, *an appearance may be entered* at the hearing without filing a pleading, if no affirmative relief is sought, *if there is full disclosure* of the persons or entities in whose behalf the appearance is to be entered, *if the interest* of such persons or entities in the proceeding *and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent* to the issues already presented and any right to broaden them unduly is disclaimed. (Emphasis added.)

A person or entity in whose behalf an appearance is entered in this manner becomes a party to and *may participate* in the proceeding *to the degree indicated by the presiding officer.*" (Emphasis added.)

Rule 58:

Limiting Number of Witnesses and Testimony.

"To avoid unnecessary cumulative evidence, the presiding officer may *limit the number of witnesses* or the *time for testimony upon a particular issue.*" (Emphasis added.)

Rule 62:

Designation.

"When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners, or an Examiner, may preside at the hearing."

Rule 63:

Authority.

"The presiding officer may set hearings and *control the course thereof;* administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission." (Emphasis added.)

Rule 75:

Briefs.

"The presiding officer may fix the time for the filing of briefs. Concurrent briefs are preferable. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the Commission in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. Ordinarily, when a matter has been submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed with the Commission. The original of each brief shall contain a certification that copies have been served upon or mailed to each party or his attorney."

Rule 76:

Oral Argument.

"If the Commission or the presiding officer is of the opinion that the complexity or importance of the issues so warrant, the Commission or the presiding officer may direct or permit the presentation of oral argument."